Mmch 25. 79. arg'd. M. H. Carey

9 Otto 48
Oct. 7. 1879

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 885.

WILLIAM H. PLATT, APPELLANT,

vs.

THE UNION PACIFIC RAILROAD COMPANY AND FRED. L. AMES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA

FILED OCTOBER 15, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 885.

WILLIAM H. PLATT, APPELLANT,

vs.

THE UNION PACIFIC RAILROAD COMPANY AND FRED. L. AMES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA

INDEX.

	Original.	Print.
Bill of complaint	1	1
Answer	12	8
Copy of bond	21	15
Deed of trust	22	16
Letter of Secretary of Interior (Exhibit A)	28	26
Letter of Acting Secretary of Interior (Exhibit C)	29	27
Exhibit D	30	28
Stipulation	31	29
Decree	32	29
Appeal	32	29
Appeal bond	33	29
Clerk's certificate	35	30

1 Pleas in the Circuit Court of the United States for the Eighth Judicial Circuit and District of Nebraska, before the Honorable Elmer S. Dundy, judge of the district court of the United States for said district, sitting in said circuit court, at the adjourned May, 1878, term thereof.

WILLIAM H. PLATT
versus
THE UNION PACIFIC RAILROAD COMPANY.

Be it remembered, that on the 28th day of September, 1878, a bill of complaint was filed in the office of the clerk of said circuit court, which said bill of complaint is in words and figures following, to wit:

To the judges of the Circuit Court of the United States for the District of Nebraska. In equity.

William H. Platt, of Hall county, in the State of Nebraska, and and a citizen of the State of Nebraska, brings this his bill against the Union Pacific Railroad Company, a corporation under the laws of the United States, having its principal place of business in the city of Boston, in the State of Massachusetts, and a citizen of the State of Massachusetts, and Fred. L. Ames, of Easton, in the State of Massachusetts, and a citizen of the State of Massachusetts; and thereupon your orator complains and says:

1. That he now is, and for more than five years last past he has at all times been the head of a family, over the age of twenty-one years, and a citizen of the United States, and qualified, in all respects, under the laws of the United States, in that behalf, to
2 enter by pre-emption right public lands of the United States; and has not at any time during the five years last past been the proprietor of three hundred and twenty acres of land in any state or territory.

2. That on and prior to the 1st day of July, A. D. 1862, the south half of the northwest quarter and the west half of the N. E. quarter of section fifteen (15) in township eleven (11) north of range nine (9) west of the sixth (6th) principal meridian, and situate in Hall county, in the State of Nebraska, was a part of the public lands of the United States which had been surveyed, and to which the Indian title had been extinguished;

And the above described tracts of land had not been sold, reserved, or otherwise disposed of by the United States, and no pre-emption or homestead claim had attached thereto, or to any part thereof; nor was the same or any part of it mineral land, and the same were then subject to be entered by pre-emption right under the laws of the United States in that behalf.

3. That by an act of the Congress of the United States, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the

government the use of the same for postal, military, and other purposes, approved July 1st, A. D. 1862," the defendant, the Union Pacific Railroad Company, was created a body corporate and politic by that name; and was empowered, among other things, to locate and construct a railroad and telegraph from a point on the one-hundredth meridian of longitude, west from Greenwich, between certain points in said act named, to the western boundary of Nevada territory; and was thereby further authorized and required to construct a single line of railroad and telegraph from a point on the western boundary of the State of Iowa, to be fixed by the President of the United States, to form a connection with said other line on said the one-hundredth meridian;

And there was thereby granted to said defendant com-
3 pany, to aid in the construction of the said lines, and for certain other inducements, every alternate section of public land designated by odd numbers to the amount of five alternate sections, per mile, on each side of said railroad on the line thereof, and within the limits of ten miles on each side thereof, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim might not have attached, and which was not mineral land; and by said act, in section three thereof, it was further provided that all the lands so granted, which should not be sold or disposed of by the said company, within three years after the entire road to be by it constructed should have been completed, should be subject to settlement and pre-emption like other lands of the United States, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company.

4. That by an act to amend the aforesaid act, and which was approved July 2nd, 1864, and by an act to amend said last-mentioned act, and which was approved July 3rd, 1866, the said Union Pacific Railroad Company was authorized to locate, construct, and continue its railroad from Omaha, in Nebraska Territory, westward, in a continuous completed line, until it should meet and connect with the Central Pacific railroad of California.

And said last-named company was authorized to locate, construct, and continue its railroad eastward, in a continuous line, until it should meet and connect with the Union Pacific railroad.

5. The said Union Pacific Railroad Company having, in the year 1865, commenced the construction of its railroad at Omaha, aforesaid, at or near the point on the western boundary of the State of Iowa, fixed by the President of the United States, so progressed with the same, that on or prior to the 15th day of July, 1869, it had located, constructed, and completed its railroad and telegraph westward, in a continuous and completed line, from a point on the western boundary of the State of Iowa, fixed by the Presi-
4 dent of the United States, opposite to Omaha, until it had met and connected with the railroad of the said Central Pacific Railroad Company at a point in the Territory of Utah, near

Ogden; and the Central Pacific Railroad Company had also located, constructed, and continued its railroad eastward in a continuous completed line until it met and connected with the Union Pacific railroad, at the point last aforesaid; all which things had been done with the consent of the Secretary of the Interior; and, at the date last aforesaid, the entire road of the said Union Pacific Railroad Company required or authorized to be constructed, by the act first above recited, and the several acts amendatory thereof, had been fully completed within the meaning and intent of the said acts;

And was, and ever since has been, in operation as a completed railroad, furnishing, in connection with the said Central Pacific railroad, continuous railroad communication for all purposes, from the Missouri river to the Pacific ocean.

6. Prior to the 15th day of July, 1869, but at what particular time or times your orator does not know and cannot state, the said Union Pacific Railroad Company had, as your orator is informed and believes and so alleges, accepted said act first above recited, designated the general route of its road as near as might be, and filed a map of the same in the Department of the Interior; and the lands hereinbefore described being within less than ten miles of the said designated route, and the route on which the said railroad was finally located and built, the said lands were, as provided for in said acts, withdrawn from pre-emption, private entry, and sale, and set off for the purposes in said acts prescribed; and were afterwards, in pursuance of said acts, and on the 26th day of March, A. D. 1875, together with other lands, conveyed to the said Union Pacific Railroad Company by the patent of the United States;

And by the grant and patent aforesaid, as your orator is advised and alleges, the legal title to the said lands first above described, was vested in said defendant company.

5 And your orator is informed and believes, and upon such information and belief alleges, that the said first described lands have not, nor has any part thereof been at any time sold or disposed of by the said defendant company; and he is advised and so alleges that therefore, the same were at all the times hereinafter mentioned, and at all times since the month of July, 1872, have been subject to settlement and pre-emption like other lands, at one dollar and twenty-five cents per acre.

7. And your orator further shows that he now is, and since some time in the year 1874 has continuously been, in the possession and occupancy of the greater part of said lands, and during that period he has built thereon a dwelling-house, in which he now resides, and did reside for some time prior to the date of his alleged settlement on said lands, as hereinafter specified, about forty by forty feet in size on the ground, and two stories high, at a cost and which is of the value of about five thousand dollars, and enclosed the same, with about two acres of ground surrounding it, with a good fence; and also built thereon a stable worth about five hundred dollars;

and another dwelling-house about eighteen by thirty feet on the ground, one story high, costing and worth about one thousand dollars, and enclosed the same with about two acres surrounding it, with a good fence, and made other improvements thereon of the value of at least five hundred dollars; and all the said improvements still remain thereon and are of the value of at least six thousand dollars, and still remain in possession of your orator, and the said described lands, separate from the improvements, is of the value of at least six thousand dollars.

8. And your orator further shows that, on the 6th day of September, A. D. 1878, he presented to the register and receiver of the land office at Grand Island, in the State of Nebraska, and which was the land office for the district in which said lands lay and were situated, his declaratory statement in writing, in the form prescribed by the Secretary of the Interior and Commissioner of the
6 General Land Office, dated on said last-mentioned day, and duly witnessed, in and by which he declared that he, being a citizen of the United States, over the age of twenty-one years, and the head of a family, had, on the day therein named, less than three months prior to presenting such statement, settled and improved the south half of the northwest quarter and the west half of the northeast quarter of section number fifteen (15) in township number eleven (11) north of range number nine (9) west, in the district of lands subject to sale at the land office at Grand Island, and containing one hundred and sixty acres, and which had not been offered at public sale and thus rendered subject to private entry, and thereby declared his intention to claim the said tract of land as a pre-emption right, under section 2,259 of the Revised Statutes of the United States, and at the same time he tendered to said register two dollars lawful money as his fees for receiving, filing, and entering the same; but the said register at that time refused to receive or accept such statement, alleging as the sole reason therefor, that a patent for the said lands had previously been issued by the United States to the Union Pacific Railroad Company.

And, afterwards, on the 21st day of September, A. D. 1878, your orator again presented and tendered to said register to be filed and entered the declaratory statement aforesaid, which he had so refused to receive or accept, and the said register then received and accepted the same as in all respects sufficient, and filed the same; and thereupon, in conformity with the rules and regulations in that behalf prescribed by the Secretary of the Interior and the Commissioner of the General Land Office, the said register and receiver of said land office did forthwith call upon the said Union Pacific Railroad Company for, and in writing, call upon it to make a statement showing whether the said lands, applied for by your orator, had been sold by it; and thereupon, in response to such call and requirement, the said Union Pacific Railroad Company did make and furnish to said register and receiver a statement that the

said lands, so applied for, had not been sold, but the same,
7 with other lands, had been by said company mortgaged for
the sum of ten million dollars; and thereupon, it appearing that such lands had not been sold or disposed of, your orator's declaratory statement was by the said register and receiver allowed, subject to your orator's showing full compliance with the pre-emption law.

And afterwards, on the 21st day of September, 1878, your orator made and filed with said register and receiver the affidavit required by the rules and regulations in that behalf to be made by a pre-emption claimant, to the effect; and setting forth that your orator, claiming the right of pre-emption, under section 2,259 of the Revised Statutes of the United States, to the lands lastly above described, had never had the benefit of any right of pre-emption under the said section; that he was not the owner of three hundred and twenty acres of land in any state or territory of the United States, nor had he settled upon or improved said land to sell the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he had not, directly or indirectly, made any agreement or contract in any way or manner with any person or persons whomsoever, by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except your orator; which affidavit was, by the said land officers, accepted as sufficient, and duly filed; and your orator shows and alleges that all the matters and things therein set forth were true.

And your orator thereupon proceeded agreeably to the rules and regulations in that behalf prescribed by the Secretary of the Interior, to make proof of his settlement and improvement upon the lands lastly above described, and did, by the oaths of two witnesses, namely, HenryP. Wakeley and Walter Bacon, both citizens of the United States, residing in Hall county aforesaid, produced before and examined by said register and receiver, make proof to the satisfaction of both said officers of such settlement and im-
8 provement upon the said lands as entitled your orator to enter and purchase the same under and by virtue of his claim and pre-emption right aforesaid; and such proofs were reduced to writing and received by said register and receiver.

And your orator at the same time paid to the said receiver two hundred dollars in lawful money of the United States for said land, being one dollar and twenty-five cents per acre therefor, and took the receiver's receipt therefor, and the same is held by him for the use and benefit of said Union Pacific Railroad Company, to be paid to it upon request, or, if it will receive the same; but your orator is informed and believes and so alleges that it wholly refuses to accept or receive the same.

9. Your orator, therefore, shows that he has an equitable title to the said lands, and a full and completed right to receive the legal

title thereto, either by patent from the United States, to be issued to him in due course of proceedings in the land department thereof, or from the Union Pacific Railroad Company, defendant, by conveyance to your orator or both; and that he ought not to be ejected therefrom or in any manner molested or disturbed in his possession thereof by said defendant, and that his settlement and residence on said lands and his possession thereof and of said improvements as aforesaid, under and by virtue of his pre-emption right aforesaid, still continues undisturbed, except by the acts of the defendant company hereinafter mentioned.

10. But so it is, may it please your honors, that the said Union Pacific Railroad Company, for the purpose of harassing your orator, and wrongfully dispossessing him of the said premises, and wholly depriving him of his title and his rights therein, has lately, on the 24th day of September, A. D. 1878, commenced in the Circuit Court of the United States for the District of Nebraska its certain action at law, in ejectment, to recover of your orator the lands above described, and so claimed by your orator, in which action said company is plaintiff and your orator is defendant, and has filed therein its petition, alleging that it is seized in fee of the said lands,
9 and is entitled to the possession thereof; and that your orator unlawfully keeps it out of the possession thereof, and demanding judgment for the recovery of the said lands and for its costs of suit, and has caused a summons in said action to be issued and to be served personally upon your orator; and by the law and the rules of practice of the said court, your orator is required to soon file his answer to the said petition and set up such defence or defences as he may have in said action; but your orator is advised and alleges that it is not competent for him, and he is not by the law and the practice of said court in which said action is pending, at liberty to therein set up, plead, or insist upon his equitable title to and right in the said lands therein in controversy; but, on the contrary, that the said plaintiff, by reason of the legal title thereto still being and remaining in it, will in said action recover judgment for the said lands and the possession thereof, and wrongfully and unjustly eject your orator therefrom by some execution, writ, or order of possession, unless restrained and enjoined by this honorable court from proceeding further in the said action.

Whereas your orator is advised and alleges that the said Union Pacific Railroad Company holds the legal title to said lands subject to your orator's said settlement and pre-emption right, and in trust for this complainant, and ought to be compelled to convey to your orator such title as it may have thereto.

11. Your orator further shows that he will be irreparably injured in his title and rights to the said lands if the said defendant company is permitted to proceed in the said action and recover therein judgment for the said lands, or the possession thereof, or in any manner to remove your orator therefrom, or dispossess him thereof, or molest or disturb him in such possession.

12. And your orator further shows that the defendant Fred. L. Ames, as your orator is informed and believes, claims to have some right or interest in the said lands as a mortgagee or trustee, or otherwise; but your orator alleges that such right or interest, if any
10 he has, was and is subject to your orator's said rights acquired by his settlement and pre-emption, and was derived by said Ames, or some person or persons under whom he claims, from the said Union Pacific Railroad Company, subject to all the conditions, restrictions, and limitations of said company's title annexed thereto and prescribed by the several acts aforesaid.

All which actings and doings are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orator in the premises; and he can only have adequate relief therein in this honorable court.

13. To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may answer all and singular the allegations and averments herein contained, but not on oath, which is hereby expressly waived; and that the said Union Pacific Railroad Company, its counsellors, attorneys, solicitors, officers, and agents may be restrained and enjoined by the writ of injunction issuing out of and under the seal of this honorable court, from proceeding further against your orator in the aforesaid action commenced against him by said company and now pending therein, for the recovery of the said premises and possession thereof, and from instituting or proceeding in any new or other action at law thereof until the hearing of this cause.

And that on the hearing thereof it be decreed that said company, its counsellors, attorneys, solicitors, officers, and agents be perpetually enjoined and restrained from the further prosecution of the said action, and from issuing or causing to be issued any execution, writ, or order of possession therein, or upon any judgment therein, or otherwise to dispossess your orator of said premises, or any part thereof, and from in any manner disturbing or molesting him in the quiet possession thereof; and from instituting or proceeding in any new or other action at law for any purpose aforesaid;
11 and from doing such other act or acts in the premises as may tend to the wrong and prejudice of your orator, and that all title to or interest in the said premises which is vested in or held by the said defendants above named, or either of them, is so vested and held in trust for your orator; and that they shall convey, release, and surrender to your orator, by suitable instruments of conveyance, all such title and interest; and if they fail to do so, that such conveyance, release, and surrender be executed or made by such officer or person as the court may direct.

And that your orator may have such further and other relief in the premises as the circumstances of this case may require and to this honorable court shall seem meet.

May it please your honors to grant unto your orator a writ of subpœna of the United States of America, issuing out of and under

the seal of this honorable court, directed to the said the Union Pacific Railroad Company and Fred. S. Ames, commanding them and each of them, on a day to be therein named, to be and appear in this honorable court, then and there to answer all and singular the premises, and to stand to, perform, and abide such order, direction, and decree therein as may be made against them.

And your orator shall ever pray, &c.

E. WAKELEY,
Solicitor and of Counsel for Complainant.

STATE AND DISTRICT OF NEBRASKA, } ss.
DOUGLAS COUNTY. }

William H. Platt, the above-named complainant, being duly sworn, says that the matters and things set forth in the foregoing bill of complaint are true to his knowledge, except as to those therein set forth on information and belief, and as to those he believes them to be true. WILLIAM H. PLATT.

12 Sworn to before me, and signed in my presence, this 27th day of September, 1878.

[SEAL.] E. E. BALCH, *Notary Public.*

Said bill of complaint is endorsed as follows:

No. 369. D. In the Circuit Court of the United States, Dist. of Nebraska. Wm. H. Platt vs. the Union P. R. Co. et al. Bill of complaint. Filed Sept. 28, 1878. Watson B. Smith, clerk. E. Wakeley, sol. for comp't.

Thereupon, afterwards, to wit, on the 2d day of October, 1878, an answer was filed in said case, which said answer is in words and figures following, to wit:

In the Circuit Court of the United States for the Eighth Judicial Circuit and District of Nebraska. In equity.

The joint and several answer of the Union Pacific Railroad Company and Fred L. Ames, defendants, to the bill of complaint of William H. Platt, complainant.

These defendants, now and at all times hereafter saving and reserving to themselves all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainant's bill of complaint set forth, for answer thereunto, or to so much or such parts thereof as these defendants are advised is material for them to make answer unto, they answer and say:

That they admit that said William H. Platt is a citizen of the State of Nebraska and that the Union Pacific Railroad Company is a corporation created by and organized under the laws of the United States, having its principal place of business in the city of Boston, in the State of Massachusetts; and that said Fred L. Ames is a citizen of the State of Massachusetts.

And defendants further answering say, they admit that
13 each and every allegation of the paragraphs of complainant's bill numbered one, two, three, and four, (1, 2, 3, & 4,) are true as therein stated.

And defendants further answering say, they admit each and every allegation in the paragraph of complainant's bill numbered five (5) as therein stated, except that they deny that on the 15th day of July, A. D. 1869, the road of the Union Pacific Railroad Company had been fully completed within the meaning and intent of the acts of Congress incorporating the same, and allege the fact to be as follows:

The road of said defendant, the Union Pacific Railroad Company, was, on the said 15th day of July, 1869, so far completed that the track of said road was finished to a junction with the track of the Central Pacific Railroad Company near Ogden, in the Territory of Utah; that the same had been accepted by commissioners appointed by the President, as required by law, in sections of forty and twenty miles as completed, and that passengers and freight trains were regularly run over and upon the same, carrying passengers and freight for hire, as common carriers, as authorized and required to do by its charter, but defendants allege that under and in pursuance of a "joint resolution for the protection of the interests of the United States in the Union Pacific Railroad Company, the Central Pacific railroad, and for other purposes," approved April 10th, 1869, providing, among other things, that to ascertain the condition of the Union Pacific railroad and the Central Pacific railroad, the President of the United States is authorized to appoint a board of eminent citizens, not exceeding five in number, and who shall not be interested in either road, to examine and report upon the condition of, and what sums, if any, will be required to complete each of said roads for the entire length thereof to the said terminus thereof (at Ogden), as a first-class railroad, in compliance with the several acts relating to said roads," the President of the United States did, on or about the first day of August, 1869, appoint such commission,
consisting of Hiram Walbridge, S. M. Felton, C. B. Com-
14 stock, E. F. Winslow, and J. F. Boyd; that thereafter, having personally examined the whole of the road of the defendant, the Union Pacific Railroad Company, said commissioners, on the 30th day of October, 1869, made their report to the Secretary of the Interior, declaring said road was not completed according to law, but would require a further expenditure of one million five hundred and eighty-six thousand and one hundred dollars ($1,586,-100.00) to so complete the same; whereupon the President of the United States withheld a quantity of subsidy bonds as security for the full completion as a first-class road of all sections of such road upon which bonds had already been issued, and for a like purpose also the Secretary of the Interior withheld from issue one-half of the patents to lands granted to said defendant company, and then, to

wit, on the 3rd day of November, 1869, ready for patenting, as will more fully appear from a certain official letter of said secretary, bearing date on said day, a copy of which is hereto attached and marked "Exhibit B," and to which reference is had for greater certainty; and that said patents were so withheld until the additional expenditure required by the report of said committee of eminent citizens should be fully made; that on the 14th day of May, 1874, the Secretary of the Interior appointed a further commission of three persons, with power to examine said road to determine whether the same had been completed as required by law, and the report of the so-called commission of eminent citizens, as more fully appears from a certain letter of said Secretary of the Interior, a copy of which is hereto attached and marked "Exhibit C," and to which reference is had for greater certainty.

That thereafter, on the 18th day of November, 1874, the said commission having personally examined said road and reported the same completed in all respects according to law, the President of the United States, upon the recommendation of the Secretary of the Interior, revoked the order suspending the issue of patents, hereinbefore referred to, as will more fully appear by a certain letter of said Secretary of the Interior, a copy of which is hereunto attached, marked "Exhibit D," and to which reference is had for greater certainty.

15 And defendants submit that by reason of the premises, said railroad was not completed according to the true intent and meaning of the act of Congress authorizing the construction of the same, until about the 14th day of November, 1874, when the same was, by the means aforesaid, finally accepted as completed according to law, and all securities held for such completion released.

And defendants further answering say, they admit each and every allegation in the paragraph of complainant's bill, numbered six (6), as therein stated, except that they deny that said tract of land has not been sold or disposed of by the defendant company, but on the contrary, allege that the same was, on the sixteenth day of April, 1867, sold and disposed of by said company, within the true intent and meaning of the third section of the act of Congress approved July 1, 1862, and entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes," in the manner following, but not otherwise.

That on said sixteenth day of April, 1876, said defendant company had accepted the said act of Congress of July 1, 1862, and the act amendatory thereof of July 2, 1864, and entered upon the construction of its said road, and that the route thereof had been surveyed, staked, and definitely fixed to a point westward of the tract described in said complainant's bill, and that said tract at the time when said route was so definitely fixed, had not been by the United

States sold, reserved, or otherwise disposed of, nor had a homestead or pre-emption claim attached thereto;

But on the contrary, by the grant contained in said act of Congress and the definite fixing of the route of said road beyond and westward of said tract, and the filing of a map thereof in the Interior Department as required by law, the title thereof became and was vested in said defendant company, and the said road at said date had been completed in all respects in conformity to law, a
16 distance of about two hundred miles westward of the Missouri river and westward of and beyond said tract;

That on said 16th day April, 1867, the title in and to said tract being so vested in said defendant company as aforesaid, said defendant company for the purpose of raising money necessary to continue and complete the construction of their said road, in accordance with the act of Congress authorizing and requiring such construction and completion, caused to be issued its coupon bonds of the denomination of one thousand dollars each and to the amount of ten million four hundred thousand dollars ($10,400,000), payable twenty years from date, at the office of said company in the city of New York, with interest at the rate of seven per cent. per annum, payable semi-annually on the first day of April and October of each year, on presentation of coupons at the office of the defendant company in the said city of New York;

That for the purpose of securing the payment of said coupon bonds so issued as aforesaid, according to the tenor and effect thereof, the said defendant company did, on the same day, cause to be executed in due form of law, a certain instrument in writing, whereby the said defendant company for the purpose of securing the sums of money mentioned in said coupon bonds, and the interest thereon, and in consideration of the sum of one dollar, granted, bargained, sold, released, enfeoffed, conveyed, and confirmed unto two certain trustees, to wit, Cyrus H. McCormick, of Chicago, Illinois, and John Duff, of Boston, Massachusetts, all and singular the said several sections of land granted to said defendant company by the several acts of Congress hereinbefore referred to, (including the said tract described in complainant's bill,) and also all the estate right, title, interest, claim, and demand whatsoever at law or in equity, of, in, or to the same, or any part thereof, then held by the defendant company, or which it might thereafter acquire, hold, own, or become entitled to by force or virtue of the said acts of Congress, upon the trusts following, to wit:

That the said lands so conveyed as aforesaid, should be under the management and control of said defendant company, to be
17 by it sold, or constructed to be sold for such prices and on such terms of payment as should be mutually agreed upon by said defendant company and said trustees; that said trustees should, upon payment of the purchase-money of the several tracts which might be sold as aforesaid, receive and apply the same and

the proceeds of all sales made by them of lands conveyed to them as aforesaid, to the sole and exclusive purpose of the payment of the coupons bonds issued as hereinbefore stated, until the same and the whole thereof should be fully paid and satisfied, and thereafter to reconvey to said defendant company the residue of said lands remaining unsold, and in default of the payment of either the interest or principal of the said coupon bonds, according to the tenor and effect thereof, for the period of six months after demand at the place of payment, the said trustees were by said instrument authorized to enter into and take possession of said lands and foreclose the said instrument, and in case of such default for the period of one year, then the principal sum of said bonds was to become due and payable, and the said trustees were by said instrument authorized to take possession of said lands, foreclose said instrument by selling at public auction in the city of Omaha, or New York, said lands, or so much thereof as might be necessary to pay and discharge said coupon bonds, or so much thereof as may be and remain then outstanding and unpaid; and in case of any sale upon any such foreclosure, or at any public auction, the said trustees were, by said instrument, empowered to make, execute, and deliver a conveyance of the said lands so sold, which should convey to the purchaser all the rights and privileges of the said defendant company in and to the property so sold, to the same extent as the same shall have been previously enjoyed and held by the defendant company, a copy of which said instrument so executed by said defendant company to said McCormick and Duff, as trustees, is for greater certainty hereunto attached, marked "Exhibit A," and made a part of this answer, and to which defendants refer the court for a full and complete statement of all the terms, conditions, and stipulations of said instrument, and for the exact legal effect thereof.

18 And defendants further answering say, that on the said 16th day of April, 1867, said instrument was, after being duly and lawfully executed and acknowledged, delivered to said trustees, who accepted said trust in due form of law, and entered upon their duties as such, and was afterwards, and before the first day of July, 1872, duly recorded in the office of the county clerk and ex-officio register of deeds of the county of Hall, in which the tract in controversy is situated; that the said coupon bonds, and the said instrument executed to secure the same, are still unpaid and unsatisfied, and that said bonds were sold and are now owned by *bona fide* purchasers for value in the financial markets of the world, and that about seven millions thereof are still unsatisfied and unpaid, and that on the fifth day of July, 1867, the railroad of the defendant company was completed to a point three hundred and eighty-five miles west of the Missouri river and had been duly accepted by the President of the United States, in accordance with law.

Wherefore defendants submit that in and by said instrument so executed and delivered as last aforesaid, the said tract with others had, prior to the lapse of three years from the date of the completion of the defendant company's road, been sold and disposed of and has not since been or become and is not now subject to pre-emption by the said complainant or any other person.

And defendants further answering say, that by the resignations of the said McCormick and Duff as trustees, and the election and qualification of the defendant Ames, in accordance with the stipulations of said instrument, said defendant has become, and for one year last past has been, the sole trustee under said instrument, and the holder of the interest and title conveyed by said instrument to the said McCormick and Duff as trustees as aforesaid.

And defendants further answering say, they admit that each and every allegation of the paragraphs of complaint's bill numbered seven, eight, and nine (7, 8, and 9) are true as therein stated, except as hereinafter set forth.

And defendants further answering say, they admit that said defendant company, for the purpose of obtaiuing possession of
19 said premises, has lately commenced in the Circuit Court of the United States for the District of Nebraska, and on the law side thereof, its action of ejectment to recover such possession, in which said action said defendant company is plaintiff and said Wm. H. Platt, complainant, is defendant, and has filed its petition alleging that said defendant company is seized in fee of the said lands and is entitled to the possession thereof; and that said complainant Platt unlawfully keeps it out of the possession thereof and demanding judgment for the possession thereof and has caused a summons to be issued therein, which has been personally served on said complainant Platt.

And defendants further answering say, that when said complainant applied to the register and receiver of the local land office to enter said premises and the said defendant company was called on to furnish the information whether the same had been sold or disposed of within three years from the date of the completion of said railroad, said defendant company answered as follows, and not otherwise: that said tract had not been sold to a private purchaser, but had been within the said three years mortgaged to secure the payment of the sum of about ten millions of dollars, as hereinbefore set forth.

And defendants further answering say, they deny all unlawful combination and confederacy as in said complainant's bill charged, and pray to be hence dismissed with their costs of suit.

THE UNION PACIFIC RAILROAD COMPANY
AND FRED L. AMES,
By their Solicitor and Counsel,
A. J. POPPLETON.

STATE & DISTRICT OF NEBRASKA, *ss.*

A. J. Poppleton, being first duly sworn, says he is the solicitor of said Union Pacific Railroad Company, which is a corporation existing under the laws of the United States, with its principal place of business in Boston, Massachusetts, and Fred L. Ames, who is a resident and citizen of the State of Massachusetts; that he has read the foregoing answer and knows the contents thereof, and that the facts therein stated are true of his own knowledge, except those matters which are therein stated on information and belief, and to those he believes them to be true.

WATSON B. SMITH, *Clerk.*

This indenture, made this sixteenth day of April, one thousand eight hundred and sixty-seven, between the Union Pacific Railroad Company, a body corporate, created by and under an act of the Congress of the United States of America, approved July 1, 1862, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes," party of the first part, and Cyrus H. McCormick, of the city of New York, and John Duff, of the city of Boston, parties of the second part, witnesseth:

Whereas, by the said act of Congress, approved July 1, 1862, being chapter 120, and by the act of Congress amendatory thereof, approved July 2, 1864, being chapter 216, a large number of sections of the public lands of the United States has been granted to the said company for the purpose of aiding in the construction of its railroad and telegraph line and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon;

And whereas, the said party of the first part, for the purpose of raising money to aid in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of said mails, troops, munitions of war, and public stores, has determined to make and issue, from time to time, under its corporate seal, and secure by mortgage on said lands, the bonds of said company, to an amount not exceeding ten thousand dollars for each mile of said railroad; said bonds to be severally for the sum of one thousand dollars each, and payable to the bearer thereof twenty years after the date thereof, with semi-annual interest at the rate of seven per centum per annum, payable on the first day of April and October ensuing the date thereof until the principal sum shall be paid, according to the tenor thereof; each of said bonds to bear date of the time of its issue and to be certified, and to have coupons for such interest annexed, and to be in form as follows, namely:

[*Bond.*]

United States of America.

No. Union Pacific Railroad Company. $1,000

Bond.

Secured by mortgage on lands granted by the United States.

The Union Pacific Railroad Company acknowledges itself to owe to bearer, one thousand dollars, which sum said company promises to pay to the holder hereof, at its office in the city of New York, twenty years after the date hereof, and also interest thereon at the rate of seven per cent. per annum, semi-annually, on the first day of each April and October ensuing the date hereof, until the said principal sum shall be paid, on the presentation of the annexed interest coupons at the office of the company in the city of New York.

In testimony whereof, the said company has caused to be affixed hereto its corporate seal, and these presents to be subscribed by its president and treasurer, this — day of ———, one thousand eight hundred and ——.

[L. S.] *Treasurer.* *President.*

[*Certificate.*]

The undersigned trustees do hereby certify that the Union Pacific Railroad Company has executed to us a deed of trust, or mortgage, purporting to convey all the right, title, and interest which the said company now has or shall hereafter acquire in and to all public lands of the United States, to said company granted by an act of Congress, approved July 1, 1862, and by the act amendatory thereof, approved July 2, 1864, except the lands which are or shall be included in the railroad and telegraph line of said company, or
22 used for the construction or operation thereof, or for the tracks, yards, depot grounds, buildings, or erections thereof, in trust for the benefit of the holders of its bonds of similar tenor with the foregoing, except as to the date, issued and to be issued to an amount not exceeding in all ten thousand dollars per mile of said railroad; with power, in case of a default in paying the interest or principal of said bonds or any of them, to take possession of and to sell the lands so conveyed, and apply the proceeds to the payment of said bonds; and that the foregoing is one of the several bonds described in and secured by said deed, and that we have caused the said deed to be recorded in every county through or in which the said road has been actually constructed, and in which the said lands, so far as thereby already acquired, are situated, and a certified copy thereof is filed in the office of the Secretary of the Interior at Washington, and that the same is a first lien upon all the lands so conveyed; and that the whole amount of such bonds

certified by us does not exceed ten thousand dollars for each mile of the track of said railroad actually laid.

Dated, ———, 18—.

} *Trustees.*

$35. [*Coupon.*]

The Union Pacific Railroad Company will pay the bearer, at its office in the city of New York, on the first day of ———, 18—, thirty-five dollars, being the interest due that day on its land grant bond No. —.

Treasurer.

Now, therefore, this indenture witnesseth, that the said party of the first part, for securing the payment of the sums of money mentioned in the said bonds, and the interest thereof, and in consideration of the premises, and also for and in consideration of the sum of one dollar to the said party of the first part in hand paid by the parties of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold released, enfeoffed, conveyed, and confirmed, and by these presents does grant, bargain, sell, release, enfeoff, convey, and confirm unto the said parties of the second part, as trustees, and to their successors and survivor, and their and his heirs and assigns forever:

All and singular, the said several sections of land so as aforesaid granted to said company by said acts of Congress; and also all the estate, right, title, interest, claim, and demand whatsoever, at law, or in equity, of, in, or to the same, or any part or parcel thereof, which the said party of the first part now has, holds, owns, or is entitled to, or hereafter may or shall acquire, have, hold, own, or be or become entitled to, by force or virtue of the said acts of Congress: Saving, excepting, and reserving all parts and parcels of said lands which are or shall be included in the said railroad and telegraph line of said company, or used for the construction or operation thereof, or for the track, yards, depot grounds, buildings, or erections thereof:

To have and to hold all and singular the lands hereby granted or intended to be granted, and each and every part and parcel thereof, with the appurtenances thereunto belonging, unto the said parties of the second part, and their successors and survivor, and their and his heirs and assigns forever, as trustees for the uses and purposes, and upon the trusts, terms, conditions, and agreements in this indenture set forth and declared.

Provided always, and these presents are upon the express condition, that if the said party of the first part shall well and truly pay, or cause to be paid, to the holders of the said bonds, and every of them, the principal sums of money therein mentioned, according to the tenor thereof, with the interest thereon, at the times and in the manner hereinbefore provided, according to the true intent and

meaning of these presents, then and from thenceforth this indenture and the estate hereby granted shall cease and determine, and all the right, title, and interest in any and all property hereby conveyed to the parties of the second part, not then disposed of under the powers hereby conferred, shall revert to and vest in the said party of the first part.

This indenture further witnesseth, that these presents and the said bonds are made, executed, and delivered upon the trusts, terms, conditions, and agreements following, that is to say:

23 That all the lands herein above conveyed and mortgaged, shall be under the sole and exclusive management and control of the said party of the first part, who shall have full power and authority to make contracts for the sale of the same at such price, on such credit or terms of payment, and such other conditions as shall be agreed on by the said party of the first part and said trustees, and as shall seem to them best calculated to secure the payment in full of all the bonds issued as hereinbefore provided, until entry or foreclosure by the trustees, as hereinafter provided. But no title to any tract of land, contracted to be sold by the said party of the first part, shall be given until the whole of the purchase-money of said tract shall be paid to said parties of the second part, or their successors or survivor, in cash or in said bonds, or over-due coupons thereof.

And for this purpose, it is agreed that the said party of the first part and said trustees shall cause all such lands, as they shall from time to time become subject to sale, to be carefully examined and surveyed, and shall affix to each tract or parcel such price as in their judgment shall be most judicious, having in view the interests of all parties; and said lands shall be and remain at all times thereafter open for sale to any person who may desire to purchase and pay therefor: the prices being, nevertheless, at all times subject to revision and alteration by the said parties, and the party of the first part may reserve from sale any lands necessary for depot grounds or other purposes connected with the construction or operation of the said railroad or telegraph.

The purchaser of any such land shall be at liberty to pay for the same in the aforesaid bonds or over-due coupons at par; and when any tract or parcel of said lands shall have been purchased and paid for, either in bonds, coupons, or cash, as hereinbefore provided, the same shall be conveyed by the said party of the first part and said trustees to the purchaser in fee simple, and shall by such conveyance be absolutely and forever released from any and all lien or incumbrance, for or on account of said bonds, or any other debt or obligation of the said party of the first part.

The said trustees shall and will cancel and discharge each and every bond and the coupons thereon, and all over-due coupons, which they may receive in payment for land, or by purchase, by defacing the seal of the corporation, perforating the signatures of the

president and treasurer, and drawing lines across each of the interest coupons, on receipt thereof; and all bonds and coupons received in payment for lands, as aforesaid, shall, when so canceled, be delivered to the said party of the first part.

The said trustees shall apply the proceeds of all sales made by them of lands hereby conveyed to the sole and exclusive purpose of the payment of the bonds provided for in and issued in conformity to the terms of this indenture. And for this purpose all such avails shall, from time to time, as the same are realized, be used in the purchase of such bonds in the market, to be canceled, so long as purchases thereof can be made at par, and whenever such bonds cannot be purchased at that rate, said trustees shall advertise for proposals to sell such bonds to them in two newspapers published in the city of New York; and after receiving such proposals they shall have power to purchase such bonds at the lowest terms so offered.

The said party of the first part doth hereby covenant and agree to pay to the holders of said bonds respectively, the said principal sums of money therein mentioned, and the interest thereof as aforesaid. If any default shall be made in the payment either of principal or interest on any of said bonds for six months, after demand at the place of payment when the same shall become due, then the said trustees may, on being requested by the holders of at least one hundred thousand dollars of such bonds, enter into and take possession of any of the lands above conveyed, and foreclose this mortgage, and may sell at public auction so much of said lands as may be necessary to discharge all arrears of such interest, and apply the proceeds, after deducting the costs, charges, and expenses of such entry, foreclosure, and sale, to the payment of such arrears of interest. If any such default shall continue for one year from the time of such demand and refusal, the principal sum of all said bonds then outstanding shall become due and payable, and the said trustees may enter into and take possession of all the lands above by these presents mortgaged or conveyed, foreclose this mortgage, and sell at public auction all said lands, or so much thereof as may be necessary, first giving at least six months previous notice of the time and place of sale in at least one newspaper published in the city of New York, and in one published in the city of Omaha; and they shall apply the proceeds thereof, after deducting the costs, charges, and expenses of such last-mentioned entry. foreclosure, and sale, to the payment of all said bonds then outstanding and the interest accrued thereon, rendering the overplus, if any there shall be, unto the said party of the first part. In case of any sale upon any such foreclosure, or at any such public auction, the said trustees shall make, execute, and deliver a conveyance of the said lands so sold, which shall convey to the purchaser all the rights and privileges of the said party of the first part in and to the property so

sold, to the same extent as the same shall have been previously enjoyed and held by the said party of the first part.

24 If, after any such entry shall be made, or any such foreclosure proceedings shall be commenced, for the satisfying of interest only, as above provided, and before the lands are sold thereon, the said party of the first part shall pay and discharge such interest, and deliver the coupons therefor to the said trustees, and pay all the costs, charges, and expenses incurred in such entry and foreclosure and the proceedings thereon, then and in every such case the said trustees shall discontinue their proceedings thereon and restore to the said party of the first part all such lands, to be held subject to the above conveyance and mortgage, and subject to all the provisions, terms, and conditions of these presents, in like manner as if such entry had not been made nor such foreclosure proceedings commenced.

In case a vacancy shall happen in the number of trustees hereinbefore mentioned, as parties of the second part in this indenture, the remaining trustee shall, while said vacancy exists, have all the rights, exercise all the powers, and discharge all the duties devolving on the said trustees by this instrument. But as soon as it conveniently may be done, such vacancy shall be filled by the nomination, by the remaining trustee, of some proper person to fill such vacancy; which nomination shall be submitted to the board of directors of said company, and if approved by them, the person so nominated and approved immediately shall become a trustee under this instrument. If said nomination is not approved, another person shall be nominated by said remaining trustee, and in like manner submitted for approval; and so on untill three nominations shall have been made. But if three successive nominations shall be made, and none of them shall be approved by said board, said vacancy shall be filled by a committee of three persons, selected, one by said remaining trustee, one by said board of directors, and a third by the two thus selected, and the person appointed trustee by a majority of the committee shall be and remain a trustee under this instrument. And the person regularly appointed a trustee to fill a vacancy, in either of the forms above specified, shall, from and after his said appointment and his acceptance of the appointment, become vested with the same estates, powers, rights, and interests, and charged with the same duties and responsibilities as if he had been one of the original trustees, parties of the second part, named in and executing this instrument; and the prior remaining trustee may and shall execute such conveyances and instruments as may be proper or necessary to vest the same in such new trustee jointly with him, or to furnish evidence of such vesting.

If at any time either of the said trustees shall resign his place as trustee, by a proper deed or writing to that effect, and such resignation shall be accepted by the said party of the first part, then, and

in every such case, the place of such resigning trustee thereupon shall become and be vacant.

Whenever all the bonds which shall have been made and issued by the said party of the first part under and in conformity to the provisions of this indenture, with the interest thereon, together with all the expenses incurred by the said trustees in the execution of the trust herein and hereby created, shall have been fully paid, the said trustees shall reconvey to the said party of the first part all and singular the said lands then in the hands of the said trustees, and not before that time sold or disposed of, in the execution of the trust hereby created.

In case the said trustees shall at any time have any trust moneys on hand, derived from the sale of the lands hereby conveyed, which will not be required to meet any immediate liabilities of the company, to which said moneys are by these presents devoted, the said moneys shall be deposited on interest with some bank or trust company in the city of New York, subject to be drawn by checks signed by the trustees, or such one of them as they may designate.

All the books of the said company and of the trustees relating to the lands hereby conveyed, shall be mutually open to the inspection of said company and said trustees.

It shall be the duty of the said trustees to certify as aforesaid, and deliver to the said party of the first part the said bonds as the same from time to time shall be demanded, not exceeding ten thousand dollars of such bonds for each mile of the track of said railroad actually constructed, to be held, issued, or used by the said party of the first part.

And it is hereby mutually agreed by and between the parties hereto, that the said parties of the second part, and their survivor and successors, and their heirs, executors, and administrators, shall not be answerable for the acts, omissions, or defaults of each other, nor for anything short of their own gross negligence or willful misfeasance.

It is hereby declared by the parties to this indenture that all the provisions of said acts of Congress, so far as they are applicable, are hereby made, and shall be deemed and taken to be, a part of this instrument, and the said provisions in all that concerns the sale and disposal of the said lands hereby conveyed to the parties of the second part, are to be observed and strictly and faithfully carried out and fullfilled.

And the said party of the first part covenants and agrees to and with the said parties of the second part, that the said party of the first part shall and will, at any and all times hereafter, and from time to time, execute, acknowledge and deliver, under its corporate seal, to the said parties of the second part, and their survivor or successors, all such other or further assurances, deeds, mortgages, obligations, transfers, indentures, and instruments

in writing, and shall and will do and perform all such other or further acts or things, as shall or may be necessary or proper, or as their counsel learned in the law shall deem necessary, proper, or expedient, for the better or more effectually securing upon the above-conveyed and mortgaged premises the payment of the said bonds so to be issued, and the interest due and to grow due thereon, in manner aforesaid, or for carrying into effect the true intent, design, objects, and purposes of these presents.

In witness whereof, the said party of the first part has caused these presents to be sealed with its corporate seal and to be signed by its president *pro tem.* and treasurer, and the said parties of the second part have set hereto their hands and seals the day and year first above written.

[U. S. revenue stamps to $10,400 canceled.]

Sealed, signed, and delivered in the presence of—
By O. AMES & J. DUFF.
Witness: CHAS. TRACY, CHARLES NETTLETON.

OLIVER AMES,
Pres't pro tem. U. P. R. R. Co.

JOHN J. CISCO,
Treasurer U. P. R. R. Co.

L. S.

Sealed, signed, and delivered in the presence of—
By JOHN J. CISCO & CYRUS H. McCORMICK.
Witness: CHARLES NETTLETON, WILLIAM W. PEARSON.

CYRUS H. McCORMICK. [L. S.]

JOHN DUFF. [L. S.]

STATE OF NEBRASKA, SECRETARY'S OFFICE. } *ss.*

I, William H. James, secretary of the State of Nebraska, do hereby certify that Charles Nettleton, before whom the foregoing acknowledgment was taken, was, at the time of taking such acknowledgment, a commissioner of deeds for the State of Nebraska, an officer duly authorized by the laws of this state to take the same; that I have compared the signature thereunto annexed with the signature of said Charles Nettleton on record in this office, and that I have also compared the impression of the seal of said Charles Nettleton with the impression of his official seal, also on record in this office, and verily believe that the signature and the impression of the seal annexed to said mortgage are genuine.

In testimony whereof, I have hereunto set my hand and affixed the great seal of the State of Nebraska.

Done at Lincoln, this twenty-third day of May, in the year of our Lord one thousand eight hundred and seventy-one, of the independence of the United States the ninety-fifth, and of this state the fifth.

[SEAL.]

WILLIAM H. JAMES,
Secretary of State.

25 STATE OF NEW YORK, }
CITY AND COUNTY OF NEW YORK. } *ss.*

Be it remembered, that on this sixteenth day of April, A. D. 1867, before me, Charles Nettleton, a commissioner of the State of Nebraska, in and for the State of New York, duly appointed and commissioned by the governor of said state, duly sworn and dwelling in said city of New York, personally appeared Oliver Ames, the president *pro tem.* of the Union Pacific Railroad Company, and John J. Cisco, the treasurer of the same company, to me respectively known, who being by me severally duly sworn, did depose, and say, that he, the said Oliver Ames, resided in Easton, in the State of Massachusetts; and that he, said John J. Cisco, resided in the city, county, and State of New York; that he, said Oliver Ames, was the president *pro tem.*, and he, said John J. Cisco, was the treasurer of said Union Pacific Railroad Company; that they each knew the corporate seal of the said company; that the seal affixed to the foregoing indenture was such corporate seal; that the said corporate seal was so affixed by the order of the board of directors of said company, and with the assent and authority of the stockholders thereof; and that the said Oliver Ames, as such president *pro tem.* as aforesaid, subscribed the said indenture, and the said John J. Cisco, as such treasurer as aforesaid, attested the same by subscribing his name thereto, by like order and authority; and they, the said Oliver Ames and John J. Cisco, acknowledged to me that they executed the same indenture in manner aforesaid, as the act and deed of the said Union Pacific Railroad Company. And, also, on the same day personally appeared before me Cyrus H. McCormick and John Duff, who are personally known to me to be the same and identical persons described in and who executed the foregoing indenture as trustees therein named, and they severally acknowledged to me that they executed the same, as their free and voluntary act and deed for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year above written.

[L. S.] CHARLES NETTLETON,
Commissioner for Nebraska in New York.

STATE OF NEW YORK, }
CITY AND COUNTY OF NEW YORK. } *ss.*

Be it remembered, that on this sixteenth day of April, A. D. 1867, before me, Charles Nettleton, a commissioner of the Territory of Dakota, in and for the State of New York, duly appointed and commissioned by the governor of said territory, duly sworn and dwelling in said city of New York, personally appeared Oliver Ames, the president *pro tem.* of the Union Pacific Railroad Company, and John J. Cisco, the treasurer of the same company, to me respectively known, who being by me severally duly sworn, did depose and say, that he, the said Oliver Ames, resided in Easton,

in the State of Massachusetts; and that he, said John J. Cisco, resided in the city, county, and State of New York; that he, said Oliver Ames, was the president *pro tem.*, and that he, said John J. Cisco, was the treasurer of the said Union Pacific Railroad Company; that they each knew the corporate seal of the said company; that the seal affixed to the foregoing indenture was such corporate seal; that the said corporate seal was so affixed by order of the board of directors of said company, and with the assent and authority of the stockholders thereof; and that the said Oliver Ames, as such president *pro tem.* as aforesaid, subscribed the said indenture, and the said John J. Cisco, as such treasurer as aforesaid, attested the same by subscribing his name thereto, by the like order and authority; and they, the said Oliver Ames and John J. Cisco, acknowledged to me that they executed the same indenture in manner aforesaid, as the act and deed of the said Union Pacific Railroad Company. And, also, on the same day, personally appeared before me Cyrus H. McCormick and John Duff, who are personally known to me to be the same and identical persons described in and who executed the foregoing indenture as trustees therein named, and they severally acknowledged to me that they executed the same, as their free and voluntary act and deed for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year above written.

[L. S.] CHARLES NETTLETON,
Commissioner for the Territory of Dakota in New York.

26 STATE OF NEW YORK, }
CITY AND COUNTY OF NEW YORK. } *ss.*

Be it remembered, that on this sixteenth day of April, A. D. 1867, before me, Charles Nettleton, a commissioner of the Territory of Colorado, in and for the State of New York, duly appointed and commissioned by the governor of said territory, duly sworn and dwelling in said city of New York, personally appeared Oliver Ames, the president *pro tem.* of the Union Pacific Railroad Company, and John J. Cisco, the treasurer of the same company, to me respectively known, who being by me severally duly sworn, did depose and say, that he, the said Oliver Ames, resided in Easton, in the State of Massachusetts; and that he, said John J. Cisco, resided in the city, county, and State of New York; that he, said Oliver Ames, was the president *pro tem.*, and he, said John J. Cisco, was the treasurer of said Union Pacific Railroad Company; that they each knew the corporate seal of the said company; that the seal affixed to the foregoing indenture was such corporate seal; that the said corporate seal was so affixed by the order of the board of directors of said company, and with the assent and authority of the stockholders thereof; and that the said Oliver Ames, as such president *pro tem.* as aforesaid, subscribed the said indenture, and the said

John J. Cisco, as such treasurer as aforesaid, attested the same by subscribing his name thereto, by like order and authority; and they, the said Oliver Ames and John J. Cisco, acknowledged to me that they executed the same indenture in manner aforesaid, as the act and deed of the said Union Pacific Railroad Company. And, also, on the same day personally appeared before me Cyrus H. McCormick and John Duff, who are personally known to me to be the same and identical persons described in and who executed the foregoing indenture as trustees therein named, and they severally acknowledged to me that they executed the same, as their free and voluntary act and deed for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year above written.

[L. S.] CHARLES NETTLETON,
Commissioner for the Territory of Colorado in New York.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK. } *ss.*

Be it remembered, that on this sixteenth day of April, A. D. 1867, before me, Charles Nettleton, a commissioner of the Territory of Utah, in and for the State of New York, duly appointed and commissioned by the governor of said territory, duly sworn and dwelling in said city of New York, personally appeared Oliver Ames, the president *pro tem.* of the Union Pacific Railroad Company, and John J. Cisco, the treasurer of the same company, to me respectively known, who being by me severally duly sworn, did depose and say, that he, the said Oliver Ames, resided in Easton, in the State of Massachusetts; and that he, said John J. Cisco, resided in the city, county, and State of New York; that he, said Oliver Ames, was the president *pro tem.*, and he, said John J. Cisco, was the treasurer of the said Union Pacific Railroad Company; and they each knew the corporate seal of said company; that the seal affixed to the foregoing indenture was such corporate seal; that the said corporate seal was so affixed by order of the board of directors of said company, and with the assent and authority of the stockholders thereof; and that the said Oliver Ames, as such president *pro tem.* as aforesaid, subscribed the said indenture, and the said John J. Cisco, as such treasurer as aforesaid, attested the same by subscribing his name thereto, by like order and authority; and they, the said Oliver Ames and John J. Cisco, acknowledged to me that they executed the same indenture in manner aforesaid, as the act and deed of the said Union Pacific Railroad Company. And, also, on the same day, personally appeared before me Cyrus H. McCormick and John Duff, who are personally known to me to be the same identical persons described in and who executed the foregoing indenture as trustees therein named, and they severally acknowledged to me that they executed the same, as their free and voluntary act and deed for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year above written.

[L. S.] CHARLES NETTLETON,
Commissioner for the Territory of Utah in New York.

27 STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK. } *ss.*

Be it remembered, that on this sixteenth day of April, A. D. 1867, before me, Charles Nettleton, a commissioner of the State of Nevada, in and for the State of New York, duly appointed and commissioned under and by virtue of the laws of the said State of Nevada, duly sworn and dwelling in said city of New York, personally appeared Oliver Ames, the president *pro tem.* of the Union Pacific Railroad Company, and John J. Cisco, the treasurer of the same company, to me respectively known, who being by me severally sworn, did depose and say, that he, the said Oliver Ames, resided in Easton, in the State of Massachusetts; and that he, said John J. Cisco, resided in the city, county, and State of New York; that he, said Oliver Ames, was the president *pro tem.*, and he, said John J. Cisco, was the treasurer of the said Union Pacific Railroad Company; that they each knew the corporate seal of said company; that the seal affixed to the foregoing indenture was such corporate seal; that the said corporate seal was so affixed by order of the board of directors of said company, and with the assent and authority of the stockholders thereof; and that the said Oliver Ames, as such president *pro tem.* as aforesaid, subscribed the said indenture, and the said John J. Cisco, as such treasurer as aforesaid, attested the same by subscribing his name thereto, by like order and authority; and they, the said Oliver Ames and John J. Cisco, acknowledged to me that they executed the same indenture in manner aforesaid, as the act and deed of the said Union Pacific Railroad Company. And, also, on the same day personally appeared before me Cyrus H. McCormick and John Duff, who are personally known to me to be the same and identical persons described in and who executed the foregoing indenture as trustees therein named, and they severally acknowledged to me that they executed the same, as their free and voluntary act and deed for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year above written.

[L. S.] CHARLES NETTLETON,
Commissioner for Nevada in New York.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK. } *ss.*

On this sixteenth day of April, A. D. one thousand eight hundred and sixty-seven, before me personally came Oliver Ames, president *pro tem.* of the Union Pacific Railroad Company, and John J,

Cisco, treasurer of the same company, to me respectively known, who being by me severally duly sworn, did depose and say, that he, said Oliver Ames, resided in Easton, in the State of Massachusetts; and that he, said John J. Cisco, resided in the city, county, and State of New York; that he, said Oliver Ames, was the president *pro tem.*, and that he, said John J. Cisco, was the treasurer of said Union Pacific Railroad Company; that they each knew the corporate seal of said company; that the seal affixed to the foregoing indenture was such corporate seal; that the said corporate seal was so affixed by order of the board of directors of said company, and with the assent and authority of the stockholders thereof; and the said Oliver Ames, as such president *pro tem.* as aforesaid, subscribed the said indenture, and the said John J. Cisco, as such treasurer as aforesaid, attested the same by subscribing his name thereto, by the like order and authority; and they, the said Oliver Ames and John J. Cisco, acknowledged to me that they executed the same indenture in manner aforesaid, as the act and deed of the said Union Pacific Railroad Company, And, also, on the same day, personally appeared before me Cyrus H. McCormick and John Duff, who are personally known to me to be the individuals described in and who executed the foregoing indenture as trustees therein named, who severally acknowledged to me that they had executed the same, as their act and deed for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my notarial seal the day and year aforesaid.

[L. S.] CHARLES NETTLETON,
Notary Public in and for the City and County of New York.

28 *Exhibit A.*

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C. *November 3rd*, 1869.

SIR: The commissioners to examine the Union Pacific and Central Pacific railroad having reported, and its report being accepted and made the basis of an adjustment of the accounts between the United States and said railroad companies, you are hereby authorized to commence the patenting of lands to such companies under grants made by Congress, as follows:

In addition to the bonds retained by the U. States as security for the completion of said roads in the matters reported deficient or not up to standard by said commission, one half of the lands ready for patenting to the Union Pacific Company will have patents suspended until further directions from this department, the other half may be patented to said company as fast as surveys and other preliminaries are completed; that is to say, beginning at Omaha and working westward, the odd-numbered sections (1, 5, 9, &c.) will be patented first to the company, (there being no valid adverse claims found,) and sections 3, 7, &c., withheld, until further directions, as above stated.

Patents to the Central Pacific may in like manner issue, beginning at Sacramento and working eastward.

It is my desire that the work be so systematized that it may be pushed forward as rapidly as possible.

Very respectfully, your ob't serv't,

J. D. COX, *Secretary.*

Hon. JOS. S. WILSON, *Comm'r G. L. O.*

29 *Exhibit C.*

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *May* 14, 1874.

SIRS: On the 30th of October, 1869, "five eminent citizens," who were appointed commissioners by the President under joint resolution of 10th April, 1869, reported certain deficiencies in the construction of the Union Pacific railroad.

The president of the company that constructed said road applied on the 8th instant for its re-examination, to determine whether it has been completed as required by law and the report of said commissioners. You are hereby appointed commissioners to make such examination and report to this department.

To aid and guide you in the examination, a printed copy of the report of the "eminent citizens" is enclosed herewith, and also a printed copy of the instructions to commissioners who are appointed to examine land-grant railroads.

It will be your duty to examine said road with special reference to the deficiencies above referred to and to report whether they have been supplied. If they have been, and the road is completed as required by law and departmental instructions, you will ascertain as near as practicable and report the date of such completion.

You will report whether the company have shown a disposition to act in good faith in supplying such deficiencies, give full and exact information as to the present condition of the road, and if it be not yet completed, state what is, in your judgment, necessary to such completion.

The 21st section of the act of 27th July, 1866, (14 Statutes, 299,) fixes your compensation at $10 per day for each day actually and necessarily employed, and ten cents per mile for each mile actually and necessarily traveled in discharging the duties required of you, which per diem and mileage shall be in full compensation for your services, and must be paid by the company.

30 You will proceed to such examination when notified so to do by the president of said company.

Very respectfully, your obedient servant,

B. R. COWEN, *Acting Secretary.*

JESSE L. WILLIAMS, Esq., Fort Wayne, Ind.,
JOHN L. MERRIAM, Esq., St. Paul, Min.,
JOHN S. DELANO, Esq., Washington, D. C., } *Commissioners.*

Exhibit D.

WASHINGTON, D. C., *Nov. 18th*, 1874.

SIR: Under joint resolution approved 10th April, 1869, "16 Stat., 56," a board of eminent citizens was appointed to examine and report upon the condition of the Union Pacific railroad and the Central Pacific railroad, and what sums would be required to complete them as first-class railroads.

On the 30th of October, 1869, said eminent citizens made their report to this department; they approved the location of the roads and their general construction, and submitted an estimate of the sums necessary for supplying the various deficiencies enumerated in detail.

On the 3rd of November, 1869, the Hon. J. D. Cox, then Secretary of the Interior, accepted said report and made it the basis of an adjustment of the land grant to the companies that had constructed said roads; he directed your predecessor to suspend the issue of patents for one half the lands inuring to said companies until further directions from the department, and to issue patents for the other half as fast as surveys and other preliminaries should be completed.

Commissioners appointed within the current year have re-examined said roads and reported said deficiencies to have been supplied and the road completed as required by report of said eminent citizens; they also state that the Union Pacific Company have
31 expended on their road $2,215,975, and the Central Pacific Company on their road $4,544,387.23 more than the sum estimated by said eminent citizens as necessary to be expended in supplying said deficiencies; they express the opinion that the roads are completed as first-class railroads, fully complying with the requirements of law and the instructions of this department.

In view of the foregoing facts, and regarding the action of the department on the 3rd November, 1869, as an acceptance of said roads, upon condition that said deficiencies should be supplied, the Secretary of the Interior has been authorized by the President to direct, and he hereby does direct, the issuing of patents to said companies for all the lands inuring to them, and revokes, until further directions are given, so much of said order of 3rd November, 1869, as requires the suspension of patents. Very respectfully,

(Signed) C. DELANO, *Secretary.*

Hon. S. S. BURDETT, *Com'r Gen. Land Office.*

Said answer is endorsed as follows:

No. 369. D. U. S. Circuit Court, District of Nebraska. William H. Platt vs. The Union Pacific R. R. Co. and Fred. L. Ames. Answer. Filed Oct. 2, 1878. Watson B. Smith, clerk.

Thereupon afterwards, to wit, on the 3rd day of October, 1878, a stipulation was filed in said case, which said stipulation is in words and figures following, to wit:

In the Circuit Court of the United States for the Eighth Judicial Circuit and District of Nebraska.

WILLIAM H. PLATT, COMPLAINANT,
vs.
THE UNION PACIFIC R. R. COMPANY AND Fred. L. Ames, Defendants. } In Equity.

32 It is hereby stipulated by and between the respective parties, complainant and defendant, that this case may and shall be set down for final hearing on the bill and answer herein heretofore filed, and without other or further pleadings and proofs, all exceptions or objections thereto in matter of form merely being hereby waived.

E. WAKELEY, *Sol. for Complainant.*
A. J. POPPLETON, *Sol. for Defts.*

Said stipulation is endorsed as follows: No. 369. D. U. S. Circuit Court, District of Nebraska. William H. Platt vs. The Union Pacific R. R. Co. and Fred. L. Ames. Stipulation. Filed Oct. 3, 1878. Watson B. Smith, clerk.

Thereupon afterwards, to wit, at the May adjourned term of said court, on the 4th day of October, 1878, the following proceedings were had in said case, as appears of record on folio 718, journal D:

WILLIAM H. PLATT, COMPLAINANT,
vs.
THE UNION PACIFIC RAILROAD AND Fred. L. Ames, Defendants.

May term, A. D. 1878.

This cause came on to be heard at this term and was *referred* by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz: that the bill of complaint of the said William H. Platt, complainant, be, and the same is hereby, dismissed, and that the said defendants recover of the said complainant their costs of this suit.

From which order and decree the said complainant thereupon in open court prayed an appeal to the Supreme Court of the United States, which is allowed. Dated October 4th, 1878.

ELMER S. DUNDY, *Judge.*

33 Thereupon afterwards, on the 9th day of October, 1878, a bond was filed in said case, which said bond is in words and figures following, to wit:

Know all men by these presents, that we, Eleazer Wakeley and J. S. McCormick, both of Omaha, Douglas county, Nebraska, are held and firmly bound unto the Union Pacific Railroad Company and Fred. L. Ames in the full sum of five hundred dollars, to be paid to said obligees, their certain attorney, successors, administrators, or assigns, to which payment, well and truly to be made, we

bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 9th day of October, A. D. 1878.

Whereas, lately, at a term of the Circuit Court of the United States for the District of Nebraska, in a suit depending in said court between William H. Platt, complainant, and The Union Pacific Railroad Company and Fred. L. Ames, defendants, a final decree was rendered against the said William H. Platt, complainant, and the said William H. Platt having prayed an appeal therefrom at the time of the rendition thereof, in open court, to the Su-
34 preme Court of the United States, which appeal was allowed by the court.

Now, the condition of the above obligation is such, that if the said William H. Platt shall prosecute his appeal to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

ELEAZER WAKELEY. [SEAL.]
J. S. McCORMICK. [SEAL.]

In presence of—
T. S. McMURRAY.

I hereby waive the approval of the foregoing bond by the judge of the said United States circuit court and accept the same as a valid and sufficient bond.

A. J. POPPLETON,
Solicitor for the Union Pacific Railroad Company and Fred. L. Ames, Defendants and obligees named in foregoing bond.

Said bond is endorsed as follows, to wit: No. 369. D. Circuit Court of U. S. for District of Nebraska. William H. Platt vs. The Union Pacific R. R. Co. and Fred. L. Ames. Bond. Filed Oct. 9, 1878. Watson B. Smith, clerk.

35 UNITED STATES OF AMERICA, } ss.
DISTRICT OF NEBRASKA. }

I, Watson B. Smith, clerk of the Circuit Court of the United States for the District of Nebraska, in the eighth circuit, do hereby certify that the foregoing folios, from one to thirty-four, contain a true and faithful transcript of all pleadings and proceedings of record and on file in my office as said clerk, in the case of William H. Platt vs. The Union Pacific Railroad Company and Fred. L. Ames.

Witness my hand and the seal of said court, at Omaha, this 9th day of October, 1878. WATSON B. SMITH, *Clerk.*

(Endorsed on cover:) Nebraska C. C. U. S. No. 885. William H. Platt, appellant, vs. The Union Pacific Railroad Company and Fred. L. Ames. Filed 15th October, 1878.

In the Supreme Court of the United States.

WILLIAM H. PLATT, APPELLANT,
vs.
THE UNION PACIFIC RAILROAD COMPANY AND FRED. L. AMES.
No. 885.

BRIEF AND ARGUMENT FOR THE UNITED STATES.

In the Supreme Court of the United States.

WILLIAM H. PLATT, APPELLANT,
vs.
THE UNION PACIFIC RAILROAD Company and Fred. L. Ames.
No. 885.

BRIEF AND ARGUMENT FOR THE UNITED STATES.

I.

The controversy in this case is whether a settler may make pre-emption upon the lands granted by Congress to the Union Pacific Railroad Company under section 3 of the act of July 1, 1862, which provides that "all such lands so granted by this section which shall not be sold or disposed of by said company within three years after the entire road shall have been completed shall be subject to settlement and pre-emption like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company." (Statutes, vol. 12, p. 492.)

In the case of said railway company *vs.* McShane (22 Wall., 444–461) this court declared that "the road was completed and accepted by the President in 1869, and these lands have been subject to such pre-emption since three years from that date, if this right can be exercised

by the settler without further legislation by Congress or action by the Interior Department." To the same effect see Union Pacific Railroad Company *vs.* United States, decided at present term.

As is well known, the Interior Department (see Exhibit A) has decided that such lands are subject to preemption the same as government lands, notwithstanding a mortgage has been placed upon them by the railroad company, and rules regulating the exercise of such right and inviting it have been promulgated by that department.

In compliance with those rules the local land-officers received the application of complainant for a quarter-section, who was duly qualified to claim the right, and the proper sum of money has been tendered to the railroad company.

The railroad company refused to receive the money (one dollar and twenty-five cents per acre), but brought ejectment against the complainant, who has been in possession of the premises since 1874, and made valuable improvements thereon. In that suit the railroad company avers that it was seized in fee of the land, and entitled to the possession thereof. (Record, p. 13, folio 19.) Complainant thereupon filed a bill in equity and asked that his right under the statute, and rules of the Interior Department, be protected.

The allegation of complainant is that the land has not been sold or disposed of within the meaning of the statute. The answer of respondents places their defense upon two grounds, namely: That on account of matters set forth on pages 9 and 10 of the record the road was not completed until November, 1874, and because of a mortgage placed upon the land in 1867 to secure a debt

(not yet fully paid), the lands have been sold or disposed of within the meaning of the statute.

The several allegations of the bill are admitted, except so far as they are contradicted by the foregoing two propositions, which are merely conclusions of law upon facts not disputed.

II.

As to the date of the completion of the road, we do not see that it is very material in this case whether it was in November, 1874, or in 1869.

Although the complainant settled upon the land in 1874, yet *in September*, 1878, the entry was made, and the respondents refused to receive the money or to recognize complainant's right, and respondents admit that at that time "said tract had not been sold to a private purchaser," but was subject to said mortgage. (Record, p. 13, folio 19).

The facts set forth in the answer were, however, fully set forth in the McShane case (22d Wall., 444, 446, 447), and the conclusion was reached that the completion of the road dates from its acceptance by the President in 1868 (p. 46).

III.

The only other question is whether the mortgage executed by the railroad company is a "sale or disposition of" the land within the meaning of the statute.

Webster's Dictionary defines the phrase *to dispose of*, in the sense evidently used in the statute, to be "to exercise *finally* one's power of control over; to pass over into the control of some one else; to alienate; to bestow; to part with; to get rid of; as to dispose of a

house; to dispose of one's time; more water than can be disposed of."

To sell is defined to be "to transfer to another for an equivalent, to give up for a consideration; to dispose of in return for a consideration, especially money; to exchange; to barter." These definitions are in accord with the common understanding and use of the words. A man sells or disposes of his house, lands, or goods when he bestows, parts with, gets rid of, or exercises *finally* his control over them.

To accomplish this in respect to the lands in question was neither the intention of the parties nor the legal effect of the mortgage that is set forth in the answer.

In the first place, by the statutes and laws of Nebraska, and of all the States and Territories in which the granted lands are situated, a mortgage conveys no title, and confers no right of possession, but is merely a lien, and the remedy is confined to an action to enforce it. (Kyger *v.* Ryley, 2 Neb. R., 20; Chick *v.* Willetts, 2 Kan. R., 384; Waterson *v.* Devoe, 18 Kan. R., 223; Drake *v.* Root, 2 Col. R., 685; Hyman *v.* Kelly, 1 Nev. R., 179; Johnson *v.* Sherman, 15 Cal. R., 287; Goodnow *v.* Ewer, 16 Cal., 461; Dutton *v.* Warschauer, 21 Cal., 609; Statutes of Wyoming; Compiled Laws of Utah, p. 478, sec. 260.)

For the effect of any instrument in relation to land we must look to the law of the State where the land is situated. (United States *v.* Crosby, 7 Cranch, 115; Clark *v.* Graham, 6 Wheat., 577; McGoon *v.* Scales, 9 Wall., 27.)

At the present day everywhere the debt is regarded as the principal thing, and the mortgage as mere security (Gilman *v.* Tel. Co., 91 U. S. R., 615). When the mortgage in question was made, however, the railroad

company expressly stipulated against the loss of control and ownership. The instrument provides "that all the lands hereinabove conveyed and mortgaged shall be under the sole and exclusive control of the party of the first part." (Record, p. 17, fo. 23.) That when the debt is paid "the estate granted shall cease and determine," and "the trustees shall reconvey to said party of the first part all and singular the said lands not then sold or disposed of" (pp. 17 and 20). That the party of the first part shall have full power and authority to make contracts for the sale of the lands at such prices and upon such conditions as they and the trustees may agree upon.

Thus we see that by the very terms of the instrument it was to be simply a lien, and the lands were not in any sense sold or disposed of, and were not to be in the future without the further consent of the mortgagor as to price and conditions, who meantime was to retain the *sole and absolute* control of the property. The mortgage simply secured the ultimate payment of a debt, and gave a preference to the bondholding creditors in case of the insolvency of the company, an event that might never occur, and as yet has not occurred.

The creation of a lien upon land, whether by the voluntary act of the owner who executes such a mortgage, or by operation of law, where a judgment for debt or tort is rendered against the owner, or for State or municipal taxes, is doubtless an incipient step that may, upon failure to discharge the debt or obligation, be followed by others and end in a sale and loss of the land upon which the lien rests.

So the owner of land who borrows money or gives a note or bond has taken an incipient step that may lead to the same result if he neglects to pay the debt. In

house; to dispose of one's time; more water than can be disposed of."

To sell is defined to be "to transfer to another for an equivalent, to give up for a consideration; to dispose of in return for a consideration, especially money; to exchange; to barter." These definitions are in accord with the common understanding and use of the words. A man sells or disposes of his house, lands, or goods when he bestows, parts with, gets rid of, or exercises *finally* his control over them.

To accomplish this in respect to the lands in question was neither the intention of the parties nor the legal effect of the mortgage that is set forth in the answer.

In the first place, by the statutes and laws of Nebraska, and of all the States and Territories in which the granted lands are situated, a mortgage conveys no title, and confers no right of possession, but is merely a lien, and the remedy is confined to an action to enforce it. (Kyger *v.* Ryley, 2 Neb. R., 20; Chick *v.* Willetts, 2 Kan. R., 384; Waterson *v.* Devoe, 18 Kan. R., 223; Drake *v.* Root, 2 Col. R., 685; Hyman *v.* Kelly, 1 Nev. R., 179; Johnson *v.* Sherman, 15 Cal. R., 287; Goodnow *v.* Ewer, 16 Cal., 461; Dutton *v.* Warschauer, 21 Cal., 609; Statutes of Wyoming; Compiled Laws of Utah, p. 478, sec. 260.)

For the effect of any instrument in relation to land we must look to the law of the State where the land is situated. (United States *v.* Crosby, 7 Cranch, 115; Clark *v.* Graham, 6 Wheat., 577; McGoon *v.* Scales, 9 Wall., 27.)

At the present day everywhere the debt is regarded as the principal thing, and the mortgage as mere security (Gilman *v.* Tel. Co., 91 U. S. R., 615). When the mortgage in question was made, however, the railroad

company expressly stipulated against the loss of control and ownership. The instrument provides "that all the lands hereinabove conveyed and mortgaged shall be under the sole and exclusive control of the party of the first part." (Record, p. 17, fo. 23.) That when the debt is paid "the estate granted shall cease and determine," and "the trustees shall reconvey to said party of the first part all and singular the said lands not then sold or disposed of" (pp. 17 and 20). That the party of the first part shall have full power and authority to make contracts for the sale of the lands at such prices and upon such conditions as they and the trustees may agree upon.

Thus we see that by the very terms of the instrument it was to be simply a lien, and the lands were not in any sense sold or disposed of, and were not to be in the future without the further consent of the mortgagor as to price and conditions, who meantime was to retain the *sole and absolute* control of the property. The mortgage simply secured the ultimate payment of a debt, and gave a preference to the bondholding creditors in case of the insolvency of the company, an event that might never occur, and as yet has not occurred.

The creation of a lien upon land, whether by the voluntary act of the owner who executes such a mortgage, or by operation of law, where a judgment for debt or tort is rendered against the owner, or for State or municipal taxes, is doubtless an incipient step that may, upon failure to discharge the debt or obligation, be followed by others and end in a sale and loss of the land upon which the lien rests.

So the owner of land who borrows money or gives a note or bond has taken an incipient step that may lead to the same result if he neglects to pay the debt. In

neither case could it be said he had sold or disposed of the land until the last act was done whereby he had *finally* lost the title and control.

If the borrower gives a mortgage upon his Nebraska lands, it differs from a general judgment lien only in that it requires a longer process to lose his lands if he does not pay the debt, as a suit must be brought upon the mortgage.

The only ground for argument that a mortgage is a "sale or disposition of" land, is by confounding the instrument in question with a mortgage as known at common law and in some of the older States; and even then, until entry for breach of condition, the argument must fail; for until the mortgagee takes possession, the mortgagor is the owner to all the world, and is entitled to rents, profits, or earnings of the property. (Gilman *v.* Telegraph Co., 91 U. S. R. 603, 617.)

In this case there is neither breach of condition nor inability to pay the debt, irrespective of the mortgage, alleged. Nor does the fact that Congress consented to the execution of the instrument change its character. By the terms of the mortgage the provisions of the acts of Congress, "in all that concerns the sale and disposal of said lands," are to be observed and faithfully fulfilled.

Congress has not abolished the provision it made to obtain an early settlement and disposition of the public domain granted. The mortgagees took the lien subject to all the conditions of the grant, and with full knowledge of their existence and nature.

IV.

In determining the real meaning of Congress in making the provision in question, as well as in deter-

mining what is a fulfillment thereof, we may look to the history of the times, to surrounding circumstances, the general policy of the government in that respect, and to the mischief to be avoided. (Rhode Island *v.* Mass., 12 Pet., 657, 723; Maryland *v.* R. R. Co., 22 Wall., 105; U. S. *v.* Un. Pac. R. R. Co., 91 U. S. R., 72.)

These are well known, and are ably pronounced in the case of Railway Co. *v.* Prescott (16 Wall., 609). The intention clearly was to obtain an early settlement of the lands. This policy lies at the basis of all legislation affecting the public domain. For *that*, lands are sold at nominal prices, pre-emption and homestead privileges are given, schools fostered, navigation improved, and the construction of railways encouraged.

In pursuance of this uniform and liberal policy, the great grant in question was made upon condition that the lands should be sold or disposed of soon, or opened to the public for settlement and purchase at $1.25 per acre. The phrase "disposed of" was properly used in addition to the word "sold," for a wise policy might require a disposition of lands other than by sale. It might be good policy to bestow some lands gratuitously to encourage settlement, manufacturing, mining, or in aid of schools or branch roads, and thus add to the business and value of the road and remaining property, and follow the traditional policy of the government and the just expectation of Congress.

If we have given the real meaning and intent of the proviso, a construction must be given it that will not defeat its purpose. It must not be defeated by the transparent pretext that a lien upon it is a "sale or disposition of" the land. The company will not be allowed by the cunning device of a lien to secure a debt payable twenty

or one hundred years hence, to exclude settlers from those vast possessions, and so nullify an important condition of the grant under the vain pretext that they had fulfilled it.

V.

In the case of Tucker *v.* Ferguson (22 Wall., 572), where the validity of a tax was involved, the court in its opinion makes use of the language that "when the mortgages were executed, the complainants (the trustees in the mortgage) took the legal title." Here, certainly, there was no intention to say that a mortgage is a sale or disposition of the property, for the complainants in that case claim exemption partly on the ground that the State having levied a specific tax upon the road and corporation, this land, *as railroad property*, was exempt. (See p. 540.)

The answer of the court is that this tax upon the land was "not a tax upon the corporation or property used in the exercise of its franchise, but upon land which it had mortgaged and was holding for sale." (See conclusion of the opinion, p. 576.) In that case there was no controversy as to the nature or effect of the mortgage. It was not before the court (p. 573).

In the later case of Gilman *v.* Tel. Co. (91 U. S. R. 617), the real nature and effect of a mortgage is discussed and decided to be merely an incident of the debt, a security or lien. In the case of Jerome *v.* McCarther (94 U. S. R., 735), prior mortgages are styled "prior incumbrances."

That the mortgage in question is only an incumbrance, and that any mortgage in Nebraska and the country west of it is no more, is abundantly proven. So it

would be, although in form a deed. (Pengle *v.* Davis, 96 U. S. R., 332.)

This is, in fact, conceded by the railroad company in its suit of ejectment against complainant wherein it alleges itself, the mortgagor, to be *the owner, seized in fee*, and entitled to possession, although there is a mortgage lien.

VI.

If we rightly argue that a mortgage lien is not a sale or disposition of the land, then complainant's right exists as declared in R. R. Co. *v.* McShane. (22 Wall., 461.)

The complainant has accepted the invitation of the Interior Department and complied with its promulgated rules. The respondents refuse to accept the money and do not allege that further action by Congress is necessary. The grant was accepted upon condition that at the expiration of three years from completion of the road the land should be subject to settlement and preemption like other lands; the other lands have reference doubtless to other portions of the public lands or lands not granted. The right of the settler is plain and peremptory, and the case is freed from any technical question of practice or procedure to secure the right. The company refuse the money and assert ownership by a suit in ejectment, as both by the law of Nebraska and the tenor of the mortgage the legal title and control of the land is in the mortgagor. The complainant has come into a court of equity where the power exists to mold a decree so as to protect every right and interest.

Ubi jus ibi remedium is an elementary maxim.

"Whenever the law gives anything it gives a remedy for the same, * * * and, indeed, it is a vain thing

to imagine a right without a remedy, for want of right and want of remedy are reciprocal." (Broom's Maxims, 191.)

That the proviso in favor of the settler is valid is not, we believe, seriously questioned. It is in keeping with the object of the grant. Congress in making the donation might have stipulated that all lands not sold within a limited period should revert to the government or be held by the company as trustee for settlement gratuitously, or for a small consideration, and the beneficiary might enforce the right as *cestui que trusts* do daily, though not parties to the instrument nor even specifically mentioned; or as suits are maintained for money had and received by defendant for plaintiff's use from a third person. The grantee in such case cannot claim adversely to those for whom he accepted the grant. (R. R. Co. *v.* Duvant, 95 U. S. R., 576.)

Since the decision of the McShane case (22 Wall., 444) the validity of the proviso is not an open question, and we need not further anticipate objections or arguments that may not be urged. We submit, the decree dismissing the bill ought to be *reversed* and relief granted as prayed for.

CHAS. DEVENS,
Attorney-General.
E. M. MARBLE,
Assistant Attorney-General.

EXHIBIT A.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND-OFFICE,
Washington, D. C., August 10, 1878.

REGISTER and RECEIVER,
United States District Land Office:

GENTLEMEN: On the 23d ultimo the honorable Secretary of the Interior rendered decision in the case of Nelson Dudymott *vs.* The Kansas Pacific Railway Company, involving a construction of the last clause of section 3 of the act of Congress approved July 1, 1862, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, * * * *" (12 Statutes, page 489), which clause is in the following words:

> And all such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and pre-emption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company.

In accordance with such decision, a copy of which is herewith sent you, the following instructions are given. They will apply only to lands granted by said act of July 1, 1862, as amended by the act of July 2, 1864, and the act of March 3, 1869, authorizing the transfer of part of the grant to the Union Pacific Railway Company, eastern division, to the Denver Pacific Railway Company.

Where any person shall apply to file a pre-emption declaratory statement for a tract or tracts not exceeding a quarter section within the limits of such grant, and where the entire road shall have been completed for more than three years, such applicant will be required to show that he or she is duly qualified as a pre-emptor. Thereupon the declaratory statement will be conditionally received and the proper note thereof made.

You will immediately thereafter call upon the proper officer of the railroad company for a statement showing whether the lands applied for had been sold by it prior to the date of the application to file a declaratory statement therefor.

If the company shall report that the land had been so sold, the report must show the date of such sale, and the name of the person or persons to whom sold, and give a description of the deed or instrument of conveyance. On the receipt of such a report you will reject the application to file a declaratory statement subject to appeal to this office.

If the company shall state that the land had not been so sold, you will allow the declaratory statement, and upon the applicant showing, at the proper time, a full compliance with the requirements of the pre-emption laws permit payment and entry at $1.25 per acre.

Each declaratory statement allowed and entry permitted should be given its proper number of the current series.

Should the company neglect or refuse to furnish the required statement within thirty days after your call therefor, you will, upon a request by the pre-emption applicant, order a hearing to determine whether the tract or tracts applied for are subject to such filing, giving

due notice of the time when and place where such hearing will be held, in some newspaper published and circulated in the county where the lands are situated, notifying said company, and any and all persons, if such there be, claiming title to said lands under it, to appear at the time and place mentioned and show cause why the declaratory statement should not be received.

At such hearing the applicant will be required to prove that he or she is an actual settler upon the land, and a qualified pre-emptor, and that the records of the county, where deeds and conveyances are recorded, do not show that the land had been sold at the date of the application to file declaratory statement therefor; and the company, or its grantee, will be permitted to establish the fact of such prior sale by it.

If the company, or its grantee, fail or refuse to appear and offer any testimony, and the proofs submitted by the applicant be, in your judgment, satisfactory, you will allow the filing of the declaratory statement, and transmit the record to this office for examination and instructions. If both parties appear at the hearing and submit testimony, you will transmit the record to this office with your joint opinion thereon.

As the law requires the proceeds of the sales of such lands to be paid to the company, payment therefor must be made with cash, and not with military bounty-land warrants or agricultural-college scrip; nor can a pre-emption filing therefor be transmuted into a homestead entry.

In making returns of the lands thus sold you will transmit separate abstracts of such lands and accounts of moneys received therefor, for each company, in order that such moneys may be passed to the credit of the proper company.

trict land officers in acting on pre-emption cases provided for in the act. In my opinion, therefore, said proviso is a condition running with the grant, and entirely beyond the jurisdiction of this office. I accordingly approve your action in rejecting Mr. Garbanatti's application." * * *

You further state that—

An appeal having been taken from the above decision, the Acting Secretary of the Interior, Mr. Cowen, on September 15, 1873, affirmed the rejection of the application for other reasons appearing in the case, but declined to pass upon the question raised under the provisions of the third section "until it is presented in a case where its decision becomes necessary." * * * For the reasons stated in the decision of my predecessor, herein quoted, and in the absence of any decision by the courts or the department to the contrary, I decide that the matter of the disposition of lands in the condition of the tracts involved in the application in hand is not within the jurisdiction or control of this office.

From this decision Mr. Dudymott, by his attorney, filed an appeal, alleging, among others, the following exceptions, viz:

First. Because section 3 of the act of Congress of July 1, 1862, which gave alternate sections of land on each side of the road to the Kansas Pacific Railroad Company, formerly the Leavenworth, Pawnee and Western Railroad Company, contained a provision that any of these lands not sold by said company within three years after the final completion of the road should be sold to actual settlers, under the pre-emption laws, at $1.25 per acre, the money to be paid to the company.

Second. Because said railroad was accepted by the government as complete in the latter part of the year 1872, or nearly five years ago; and, therefore, the land above described being a part of said grant, and still unsold by said company, is now and should have been for nearly two years past open to pre-emption settlement.

The third section of the act making the grant to aid in the construction of the road of which the Kansas

Pacific Railroad Company is the successor reads as follows:

SEC. 3. *And be it further enacted*, That there be, and is hereby, granted to the said company for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, and munitions of war and public stores thereon, every alternate section of public lands designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed: *Provided*, That all mineral lands shall be excepted from the operations of this act; but where the same shall contain timber the timber thereon is hereby granted to said company. And all such lands so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and pre-emption like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company. (12 Statutes, p. 489.)

By an act of Congress approved July 2, 1864, said grant was increased to ten sections per mile on each side of said road, and the limits within which the same were to be selected to twenty miles on each side thereof. (13 Statutes, p. 356, section 4.)

The road was completed within the time limited in the grant, and the last section thereof accepted by the President October 19, 1872.

The proofs submitted do not show conclusively that Mr. Dudymott is a qualified pre-emptor, nor does it satisfactorily appear that the tracts described in his declaratory statement have not been sold by said company. He alleges that he is a qualified pre-emptor, and has presented affidavits showing that said tracts had not

been sold by said company at the date he filed his application therefor as a pre-emptor. Considering him to be qualified as a pre-emptor, and the lands at that time to have been unsold by said company, the question is presented whether, under the last clause of said third section, his application should have been received, and, if full compliance with the pre-emption law, including payment for the tracts, were shown, a patent therefor should issue to him by the United States.

Nearly all of the grants made by the United States to aid in the construction of railroads and for other works of internal improvement have had annexed to them conditions, some of which are conditions precedent, and others conditions subsequent; such conditions are found in this grant. It cannot be denied that Congress had the right to make a grant to said company absolute and unconditional, but, in order to secure the objects for which this grant was made, conditions were annexed.

The company had the right to accept or reject the grant with the conditions therein made, but having accepted it, it is now estopped to deny their force and effect.

One of these conditions, and the one under which the applicant now claims the right to enter a portion of the land granted to said company, is that—

> All such lands so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and pre-emption like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company.

The object of including this condition in the grant is apparent. Referring to the objects to be attained by this provision, the Supreme Court, in the case of the

Railway Company *vs.* Prescott (16 Wallace, p. 609), said:

It is wisely provided that these lands shall not be used by the company as a monopoly of indefinite duration. The policy of the government has been for years to encourage settlement on the public lands by the pioneers of emigration, and to this end it has passed many laws for their benefit. This policy not only favors the actual settler, but it is to the interest of those who, by purchase, own adjacent lands, that *all of it* shall be open to settlement and cultivation. Looking to this policy and to the very large quantity of lands granted by this statute to a single corporation, Congress declared that if the company did not sell those lands within a time limited by the act, they should then, without further action of the company, or of Congress, be open to the actual settlers under the same laws which govern the right of pre-emption on government lands, and at the same price. Any one who has ever lived in a community where large bodies of lands are withheld from use or occupation, or from sale except at exorbitant prices, will recognize the value of this provision. It is made for the public good, as well as for that of the actual settler. To permit these lands to pass under a title derived from the State for taxes would certainly defeat this intent of Congress. It makes no difference in the force of the principle, that the money paid by the settler goes to the company. The lands which the act of Congress declares shall be open to pre-emption and sale are withdrawn from pre-emption and sale by a tax-title and possession under it, and it is no answer to say that the company which might have paid the taxes gets the price paid by the settler.

In a subsequent decision (Railway Company *vs.* McShane, 22 Wallace, p. 461), the Supreme Court, while holding that the grounds above set forth were untenable and not sufficient reasons on which to deny the right of the State to tax the lands, if the company had in other respects fully com plied with the law (and in that respect overruling its decision in the case above cited), said:

The road was completed and accepted by the President in May, 1869, and those lands have been subject to such pre-emption since

three years from that date, if this right can be exercised by the settler without further legislation by Congress or action by the Interior Department.

We do not now propose to decide whether any such legislation or action is necessary, or whether any one, having the proper qualification, has the right to settle on these lands, and tendering to the company the dollar and a quarter per acre enforce his demand for a title. It is not known that any such attempt has been made, or ever will be, or that Congress or the department has taken, or intends to take, any steps to invite or aid the exercise of this right. It would seem that if it exists it would not be defeated by the issue of the patent to the company, and it may therefore remain the undefined and uncertain right, vested in no particular person or persons, which it now is for an indefinite period of time.

While it is true that neither of said decisions clearly and distinctly defines the right of the government in the disposal of said lands, still they clearly indicate the opinion of the court that such a right exists, and whether it be considered that the estate granted is a conditional estate or an estate with a conditional limitation, in either case I am of the opinion that it must be held that the condition runs with the grant, and is in effect a reservation of a power of sale in the government of the lands granted to the company which remained unsold by it at the expiration of three years after the entire road was completed, under the provisions of the pre-emption law. It is manifest, I think, that Congress did not intend to grant to said company so large a quantity of land to be held and sold by it at speculative prices; but desiring to give it aid and assistance in its undertaking, at the same time provided that the actual settler who was willing to pay the price stipulated should have the right to settle and make a home upon any of the lands so granted; and in order to secure this right to the settler, and at the same time secure to the company an adequate con-

sideration for the lands, reserved the right of sale thereof after the road had been completed for three years.

This view is not inconsistent with the object to be attained in making the grant; that object was to aid a corporation in the construction of a work of national importance, which contemplated an expenditure of money beyond the resources of private individuals, and whether that aid should be given in lands which might be sold by the company to reimburse it for expenditures made, or to be made, or whether the government should sell the lands at a stipulated price and pay the proceeds arising therefrom to said company, was considered immaterial both by the government and the company that accepted the grant with the condition.

The fact that said company so understood this grant is made evident by a circular issued by its land commissioner, dated May 12, 1873, inviting purchases of its lands, in which he says:

> The road was accepted by the government as complete about six month ago. In three years from that time the unsold lands will be subject, we suppose, to the pre-emption laws, but we hope and expect to have all our lands sold before that time arrives. All railroad lands sold by this company are sold clear of taxes, with assurance of perfect title when paid for.

More than three years having elapsed since the completion of said road, and its acceptance by the President, at the time Mr. Dudymott filed his declaratory statement for the tracts in question, I am of the opinion that his application should have been received by the local officers, subject, however, to the condition that it be made to appear, before final certificate issue to him, that at the time his declaratory statement was filed for said tracts said company had not sold or disposed of the same.

three years from that date, if this right can be exercised by the settler without further legislation by Congress or action by the Interior Department.

We do not now propose to decide whether any such legislation or action is necessary, or whether any one, having the proper qualification, has the right to settle on these lands, and tendering to the company the dollar and a quarter per acre enforce his demand for a title. It is not known that any such attempt has been made, or ever will be, or that Congress or the department has taken, or intends to take, any steps to invite or aid the exercise of this right. It would seem that if it exists it would not be defeated by the issue of the patent to the company, and it may therefore remain the undefined and uncertain right, vested in no particular person or persons, which it now is for an indefinite period of time.

While it is true that neither of said decisions clearly and distinctly defines the right of the government in the disposal of said lands, still they clearly indicate the opinion of the court that such a right exists, and whether it be considered that the estate granted is a conditional estate or an estate with a conditional limitation, in either case I am of the opinion that it must be held that the condition runs with the grant, and is in effect a reservation of a power of sale in the government of the lands granted to the company which remained unsold by it at the expiration of three years after the entire road was completed, under the provisions of the pre-emption law. It is manifest, I think, that Congress did not intend to grant to said company so large a quantity of land to be held and sold by it at speculative prices; but desiring to give it aid and assistance in its undertaking, at the same time provided that the actual settler who was willing to pay the price stipulated should have the right to settle and make a home upon any of the lands so granted; and in order to secure this right to the settler, and at the same time secure to the company an adequate con-

sideration for the lands, reserved the right of sale thereof after the road had been completed for three years.

This view is not inconsistent with the object to be attained in making the grant; that object was to aid a corporation in the construction of a work of national importance, which contemplated an expenditure of money beyond the resources of private individuals, and whether that aid should be given in lands which might be sold by the company to reimburse it for expenditures made, or to be made, or whether the government should sell the lands at a stipulated price and pay the proceeds arising therefrom to said company, was considered immaterial both by the government and the company that accepted the grant with the condition.

The fact that said company so understood this grant is made evident by a circular issued by its land commissioner, dated May 12, 1873, inviting purchases of its lands, in which he says:

> The road was accepted by the government as complete about six month ago. In three years from that time the unsold lands will be subject, we suppose, to the pre-emption laws, but we hope and expect to have all our lands sold before that time arrives. All railroad lands sold by this company are sold clear of taxes, with assurance of perfect title when paid for.

More than three years having elapsed since the completion of said road, and its acceptance by the President, at the time Mr. Dudymott filed his declaratory statement for the tracts in question, I am of the opinion that his application should have been received by the local officers, subject, however, to the condition that it be made to appear, before final certificate issue to him, that at the time his declaratory statement was filed for said tracts said company had not sold or disposed of the same.

In your decision it is held "that the matter of the disposition of lands in the condition of the tracts involved in the application in hand is not within the jurisdiction or control of this office." If the views I have expressed in relation to the sale and disposal of said lands are correct, and I see no reason to doubt their correctness, the sale and disposal of lands in the condition of those applied for, if unsold at that time by said company, is clearly within the jurisdiction of your office, "like other lands."

By the terms of the grant by which said lands, or the proceeds which shall arise from the sale thereof, inured to said company, it is provided that lands remaining unsold at the expiration of three years from the time when the entire road was completed, shall be subject to settlement and pre-emption like other lands, at a price not exceeding $1.25 per acre; in other words, that said lands shall revert to the public domain for sale and disposal for said company under the pre-emption laws of the United States. And whether it be considered that said lands are public lands in a general or special sense cannot, in my opinion, affect the jurisdiction of your office in making sale and disposal of the same.

At the time this grant was made the provisions of the pre-emption law were well understood, and, in so far as said act provided that the lands granted shall be subject to settlement and pre-emption like other lands, it must be considered that Congress intended that the same rules and regulations should be adopted in relation to the disposal and sale of said lands as are adopted by your office in the sale of public lands under the pre-emption law. While it may be true that further legislation in relation to the sale of said lands might have been advisable, still I do not think it to have been absolutely

necessary, except to provide for the manner in which the proceeds which shall arise from the sale of said lands shall be paid to said company.

Counsel for the company suggests that these lands are covered by a mortgage, executed by said company, to secure moneys borrowed in the construction of its road. If this be true, I am unable to perceive that said mortgage is any obstacle to the disposal of said lands in accordance with the provisions of the granting act.

The company mortgaged such interests in the lands as it possessed, and the mortgagees must be considered to have taken the mortgage with full knowledge of the right of the company to make the same. Aside from these considerations, however, the provision in the mortgage which authorizes the company to sell and dispose of the lands granted, and make conveyance thereof to purchasers, which conveyance shall release the right of the mortgagees to the particular tract, will in the same manner protect the pre-emptor who purchases of the government, which has authority to sell the lands and pay the proceeds arising from such sales to the company.

The local officers of each of the land districts in which lands inuring to said company by virtue of said grant are situated should be instructed to receive filings conditionally for said land in tracts not exceeding one quarter-section, by qualified pre-emptors, and on receipt of such declaratory statements to call upon the company for a statement showing whether the lands applied for have been sold by it; and if not sold, then the declaratory statements should be allowed, subject to the applicant's showing full compliance with the pre-emption law.

If the company neglects or refuses to furnish such statement to the local officers within thirty (30) days after

service of said notice, in that case they should be instructed to order a hearing, if so requested by the applicant, to determine whether such tract or tracts are subject to such filing, giving notice of the time and place when and where such hearing will be held, in some newspaper published and circulated in the county where the lands are situated, notifying said company, and any and all persons, if such there be, claiming title to said tracts under it, to appear at the time and place mentioned to show cause why said declaratory statements should not be received.

At such hearing the applicant should be required to show that he is an actual settler on the land applied for, a qualified pre-emptor, and that the records of the county where deeds and conveyances are recorded do not show that said tracts had been sold at the date of the filing of his declaratory statement, and the company or its grantee to show whether said tracts applied for have been sold by it.

If the company or its grantee fail or refuse to appear and offer any testimony, the filing should be allowed, under the rule that "where the subject-matter of a negative averment lies peculiarly within the knowledge of the other party the averment is taken as true, unless disproved by that party." (1 Greenleaf on Evidence, paragraph 79.)

In making returns of the moneys arising from the sale of said lands, the local officers should be instructed to keep a separate account of the lands sold and the moneys received therefor on account of said company, in order that the same may be passed to its credit.

In this case, inasmuch as it does not satisfactorily appear whether the lands applied for had been sold by the

company at the time Mr. Dudymott filed his declaratory statement, you will instruct the local officers to call upon said company for a statement showing whether said lands had been sold by it at that time, and if it refuse or neglect to furnish such statement within thirty (30) days after the service of said notice, that they order a hearing to determine that fact, under the rule above set forth.

For the reason stated your decision is reversed; and the papers transmitted with your letter of January 22, 1878, are herewith returned.

Very respectfully,

C. SCHURZ,
Secretary.

COMMISSIONER OF THE GENERAL LAND OFFICE.

Application for a review of the foregoing decision having been made to the honorable Secretary of the Interior, the whole subject was still further examined by him, and the previous opinion was affirmed by his decision of 3d September, 1878, hereto appended, and the instructions were ordered to issue accordingly.

DEPARTMENT OF THE INTERIOR,
Washington, September 3, 1878.

SIR: I have considered the application of the Kansas Pacific Railroad Company for a suspension and reconsideration of my decision of July 23, 1878, in the matter of the application of Nelson Dudymott to file a declaratory statement on the N. ½ NE. ¼ lot No. 7, and the SW. ¼ of NE. ¼ of section 7, township 11 S., range 5 E., in the State of Kansas, which tracts fall within the granted limits of said company, made by the act of July

I, 1862, as amended by the act of July 2, 1864 (12 Statutes, 489, section 13; and 13 Statutes, 356, section 4).

Owing to the importance of the questions involved in this case, I have considered a like application made by the Union Pacific Railroad Company, filed by its attorneys, as said company will be affected in like manner as the Kansas Pacific Railroad Company, although not a party to the record in this case.

In my decision of July 23, 1878, it was held—

First. That the grant to said company was made subject to all the conditions named in the granting act, one of which is, that all the lands so granted "which shall not be sold or disposed of by said company within three years after the entire road shall have been completed shall be subject to settlement and pre-emption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company."

Second. That more than three years having elapsed since the entire road was completed, all of the lands inuring to said company, by virtue of its grant, not sold, are subject to settlement and pre-emption, like other public lands, at one dollar and twenty-five cents per acre.

The applications for suspension and reconsideration of said decision are based upon the following grounds:

First. That the grant to said companies was a grant *in presenti*, and vested in them, and them only, the right to sell all of the lands granted.

Second. That the execution and delivery of a mortgage by the companies is a disposition of such lands within the meaning of the words "or disposed of," occurring in the last clause of the third section of the granting act.

Third. That if an actual sale of the lands, and an actual sale *only*, was authorized, the companies, by the execution and delivery of certain mortgages to the persons therein named, have "sold and disposed of" and conveyed the title to all the lands inuring to them by virtue of the granting acts. In my decision of July 23, 1878, it was held that the conditions contained in the last clause of the third section of the granting act "is in effect a reservation of a power of sale in the government of the lands granted to the company which remain unsold by it at the expiration of three years after the entire road was completed, under the provisions of the preemption law." This conclusion was reached after mature deliberation, and I see no good reason to doubt its correctness.

Even if it be true that the grant to the companies was a grant *in presenti*, it was nevertheless subject to the conditions therein mentioned, and vested in the companies for a time only, the exclusive right to sell their lands at such rates and for such prices as they might be able to obtain therefor. The time, however, in which the companies might exercise this right was limited in the act, and the companies, by the performance of the conditions precedent therein named, have terminated that right and rendered the lands unsold subject to sale by the government.

The fact that the Kansas Pacific Railroad Company, at least, understood that its right to sell and dispose of the lands inuring to it under its grant would cease at a certain time was clearly shown in my decision in this case. It is not now denied by said company that such construction was given to the act by its officers when the circular of its land commissioner, dated May 12, 1873,

was issued. If that construction was correct, then it is correct now, and I am unable to perceive any reason why the law should not be administered in accordance with its plain terms, and the clear understanding by both parties in interest to the contract and stipulations therein contained.

In support of the second proposition counsel have cited authorities showing the construction placed by the Supreme Court and the honorable Attorney-General on the words "dispose of," as they occur in the third section of Article IV of the Constitution of the United States, which reads as follows:

> Congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property of the United States.

In the authorities cited it is held that the words "dispose of" authorize not only the sale of lands and other property by the government, but also the leasing of the same. It is urged by counsel, therefore, that inasmuch as the Supreme Court has given a larger and more comprehensive meaning to the word *dispose* than to the word *sell*, the words "or disposed of" in the clause under consideration should be construed to include not only a sale, but any other disposition which the companies may have made of the lands granted to them.

The word *dispose* undoubtedly is more comprehensive in its meaning than the word *sell*, and may be properly used not only to convey the idea of a sale of lands, but also some other or different disposition of the same. It may be used, and, in fact, often is used, in the same sense and to convey the same idea as the word sell. The question now under consideration, however, is not the meaning which *may* be given to the words "or disposed

of," but the meaning which Congress intended *should* be given to those words as they occur in said clause.

It is an established rule in the exposition of statutes that the intention of the law-giver is to be deduced from a view of the whole and every part of a statute taken and compared together. When the words of the statute are not explicit, the intention is to be collected from the context—from the occasion and necessity of the law, from the mischief felt, and the object and remedy in view; and the intention is to be taken or presumed according to what is consonant to reason and good discretion. (Potter's Dwarris, page 194, note 13.)

The framers of laws do not weigh only the force of single words, as philologists and critics, but of whole clauses and designated objects, as statesmen and practical reasoners. In common language the same word has often various meanings. The peculiar sense in which a word is used in any section is to be determined by the context. (*Ibid.*, pages 195, 196.)

In relation to the proper construction to be given to words, the Supreme Court in the case of Maillard *vs.* Lawrence (16 Howard, 261) laid down the following rule:

The popular or received import of words furnishes the general rule for the interpretation of public laws as well as for private and social transactions, and wherever the legislature adopts such language in order to define and promulge their actions, or their will, the just conclusion from such a course must be that they not only themselves comprehend the meaning of the language they have selected, but have chosen it with reference to the known apprehension of those to whom the legislative language is addressed, and for whom it is designed to constitute a rule of conduct, viz, the community at large.

By the third section of the granting act, the section which contains the clause now under consideration, a grant of many millions of acres of land was made to said companies for the purpose of aiding in the construction of the roads therein mentioned.

By the fifth section of said act it is provided that the

Secretary of the Treasury shall, upon the proof therein mentioned being presented to him, issue to said companies the bonds of the United States to the amount of sixteen thousand dollars for each mile of said road as constructed, in sections of forty miles each, and that the issuance and delivery of said bonds to the companies "shall *ipso facto* constitute a first mortgage on the whole line of the railroad and telegraph line, together with the rolling stock, fixtures, and property of every kind and description."

If it be true, therefore, that Congress intended that the execution and delivery of a mortgage by either of said companies should be a disposal of the lands granted within the meaning of the words "or disposed of," the same act which provided that unless said lands were "sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and pre-emption like other lands," provided in terms that no sales should be made by settlement and pre-emption of the lands granted to the company which accepted the bonds, provided for in the fifth section of the act.

The act must be so construed, if possible, as to give each and every part of it force and effect.

What force and effect, however, can be given to this clause if the execution and delivery of a mortgage be held to be the sale or disposal intended by Congress?

If by the execution and delivery of such mortgages all of said lands were "sold or disposed of," how could they thereafter be sold under the pre-emption law, and the moneys arising from such sales be paid to the companies? Manifestly, this was not the meaning given by Congress to the words "or disposed of," and hence such

meaning should not now be imparted to them. In the case of the Railway Company *vs.* Prescott (16 Wallace, 609), the Supreme Court in referring to this clause used the following language:

> Looking to this policy, and to the very large quantity of lands granted by this statute to a single corporation, Congress declared that if the company did not *sell* those lands within a time limited by the act, they should then, without further action of the company, or of Congress, be open to the actual settler under the same laws which govern the right of pre-emption on government lands, and at the same price.

The court in that case evidently understood this clause to mean an actual sale of the lands, and so construed the words "sold or disposed of," in effect holding that "or disposed of" is simply interpretative of "sold." This, I think, is the true construction to be placed on those words. The large grant of lands made to said companies out of the public domain of the United States, and the loan of the credit of the government, were not simply to benefit and enrich the companies, but to aid in the construction of a work of national importance, which would not only benefit the company undertaking its construction, but would, also, benefit the people of the entire country.

It was clearly not the intention of Congress that so large a body of land as that granted by this act should remain under the control of any corporation for an indefinite period of time, and to prevent such a result the time within which the company or companies might have the exclusive sale of the lands granted was limited. At the expiration of that time they were to be sold like other public lands, at the minimum price established by law.

Congress did not intend that the lands granted should

be sold at speculative prices, nor that they should be kept in large quantities out of market for an unreasonable length of time. This is evident from the low prices at which they were required to be sold at the expiration of three years from the completion of the entire road, and the short period that was allowed the company in which to sell its lands.

It has been from the earliest history of this government one of the most important and beneficent principles governing its land policy, not to favor the creation of large estates, but to put the public lands at such rates, and in such quantities, within the easiest possible reach of the poor and homeless, that the latter might acquire homes for themselves and their families, and thereby promote a healthy development of the agricultural resources of the country. This principle has evidently been kept in view by the law-making power when aiding the construction of national highways by extensive grants of land, and in accordance with it, it was wisely provided in this grant that, unless the lands granted were sold by the companies within a reasonable time, they should be opened to actual settlement under the auspices of the Government of the United States, and under the provisions of the pre-emption law, so that they might be acquired and settled upon by persons of limited means, while the proceeds of such sales are to be turned over to the companies.

I am, therefore, of the opinion that an actual sale to a *bona fide* purchaser, for a valuable consideration, within the time limited, is the only disposition which was intended by Congress should exempt any of said lands from sale under the pre-emption law.

In support of the third proposition, counsel have filed

copies of certain mortgages (called deeds of trust), executed by said companies to secure the payment of the bonded obligations of the same.

These mortgages purport to convey conditionally the title to all the lands granted to said companies by the act of July 1, 1862, as amended by the act of July 2, 1864, reserving, however, the right to sell said lands on certain conditions, and providing that the moneys arising from such sales shall be paid to the trustees named in the mortgages, to be applied either in liquidation of the interest accruing on the bonds, or of the bonds themselves.

Counsel urge that the execution and delivery of these mortgages was in effect a sale and conveyance of the legal title of the companies to all the lands inuring to them under said grants.

For the purpose of determining the question thus presented, it becomes necessary not only to fix the character of the instruments executed by said companies, but also to ascertain whether the legal title to the lands therein described was by said instruments conveyed to the trustees therein named.

Each of these instruments provides that, if the company shall pay the indebtedness thereby secured, the estate, right, title, and interest of the parties of the second part shall cease, determine, and become void.

In the case of Wilkins *vs.* Wright (6 McLean, 341), the court, in passing upon the instrument then under consideration, said:

> If it be a mortgage, before forfeiture it may be sold on execution against the mortgagor, subject to the mortgage. But if it be a deed of trust, nothing remains in the grantor which can be reached by execution. If it be a mortgage, on the payment of the money the title reverts to the mortgagor. But if it be a deed of trust, a recon-

veyance of the land is necessary. In either case the land is a security for the money. But under a mortgage a sale would be necessary to perfect the title in the mortgagee, or in any other person. But if the instrument be a deed of trust, the fee stands vested in the grantee, and no sale is necessary. The distinction between a deed of trust and a mortgage is somewhat technical, and in many cases different minds might incline to the one character or the other of the same instrument.

The parties in this case call the instrument a deed of trust, and provide that on the payment of the money the title should be reconveyed to the grantor free from all incumbrances. This is not the language of a mortgage, which provides that, on the payment of the money, the conveyance should be of none effect.

Tried by the rule laid down in this case, and I have been unable to find any case establishing a different rule, the instruments filed in this case are mortgages and mortgages only.

Counsel have called my attention to the following cases, in which they claim that the court has decided that a mortgage conveys the legal title to the land therein described, viz: Brobst *vs.* Brock (10 Wallace, 529); Conrad *vs.* The Atlantic Insurance Company (1 Peters, 441); Van Ness *vs.* Hyatt (13 Peters, 297); Bank of Metropolis *vs.* Guttschlick (14 Peters, 28); and Tucker *vs.* Ferguson (22 Wallace, 527).

In the case of Brobst *vs.* Brock the court held that "as between the mortgagor and all others than the mortgagee it is a lien, a security, and not an estate; but as between the parties to the instrument or their privies, it is a grant which operates to transmit the legal title to the mortgagee and leaves the mortgagor only a right to redeem."

The United States is not a party to any of these instruments, and hence under the case cited the mortgages are simply a lien.

In the case of Conrad *vs.* The Atlantic Insurance Company, the court held that the mortgagee holds the estate as the trustee of the mortgagor, and nothing more.

In the cases of Van Ness *vs.* Hyatt and Bank of Metropolis *vs.* Guttschlick, in both of which the instruments in question covered lands in the District of Columbia, the court held that the question was to be decided according to the laws of the State of Maryland, which adopted the rule established by the English common law. That rule, however, does not prevail in any of the States or Territories in which the lands covered by the mortgages filed in this case are situated.

In the case of Tucker *vs.* Ferguson, which involved the right of the State of Michigan to levy taxes on certain lands granted to said State by the act of March 3, 1856, to aid in the construction of a road from Flint to Père Marquette, in said State, the court found—

First. That the entire road had been completed, and hence that all conditions precedent prescribed in the act of 1856 had been complied with, and the United States, therefore, had no interest in the lands,

Second. That by an act of the legislature of said State the title granted to the State was vested in the company.

Third. It appears in the record of the case that the instruments executed by the company to the trustees were intended to give the trustees the right to sell the lands therein described, in order to raise moneys with which to construct the road.

In this case the court held that the title passed to the trustees. The question, however, as to whether the legal title passed to the trustees or not by the mortgages was unnecessary in the decision of the case, and in that respect is merely *obiter dictum*, for whether the title was

absolutely in the company or in the trustees, the lands in either case were subject to taxation by the State.

None of the decisions cited, in my opinion, should be considered as authority upon the question presented in this case.

It is a well-settled rule that the law of the State in which the lands are situated controls exclusively its descent, alienation, and transfer and the effect and construction which should be given to instruments which are intended to convey the legal title to the same.

In the case of the United States *vs.* Crosby (7 Cranch, 115), the court said: "The court entertain no doubt upon the subject, and are clearly of the opinion that the title to the land can be acquired and lost only in the manner prescribed by the law of the State where such land is situated."

In the case of Clark *vs.* Graham (6 Wheaton, 577), the court said: "It is perfectly clear that no title to lands can be acquired or passed, unless according to the laws of the State in which they are situated."

In the case of McGoon *vs.* Scales (9 Wallace, 27), the court said: "It is a principle too firmly established to admit of dispute at this day, that to the law of the State in which land is situated must we look for the rules which govern its descent, alienation, and transfer, and for the effect and construction of conveyances."

The following cases are to the same effect: McCormick *vs.* Sullivan (10 Wheaton, 192); Watts *et al. vs.* Waddell *et al.* (6 Peters, 389); United States *vs.* Fox (4 Otto, 320); Clark *vs.* Reyburn (8 Wall., 318); Brine *vs.* Hartford Fire Insurance Company, October term, 1877.

It becomes necessary, therefore, to determine whether the legal title to lands is conveyed by a mortgage in the

States and Territories through which the road and its branches, authorized by the act of July 1, 1862, run, and in which the lands granted thereto are situated.

In the case of Chick *et al. vs.* Willetts (2 Kansas Reports, 384), the supreme court of that State said:

In this case the common-law attributes of mortgages have been by statute wholly set aside, and the ancient theories demolished. The statute gives the mortgagor the right of possession even after breach, and confines the remedy of the mortgagee to an ordinary action and sale of the mortgaged premises, negativing the idea of title in the mortgagee.

A mortgage is a mere security, although in the form of a conditional conveyance, creating a lien upon the property, but vesting no title, and giving no right of possession whatever, either before or after breach, and does not limit the mortgagor's right to control it, except that the security shall not be impaired. He may pass title by sale subject to lien.

The recent case of Waterson *vs.* Devoe (18 Kansas, 223), by the same court is to the same effect.

In the case of Kyger *vs.* Ryley (2 Nebraska, 20), the supreme court of the State of Nebraska said:

In our State the mortgagor has the right of possession of the mortgaged premises before or after the money is due upon the mortgage, and after decree of foreclosure and sale, and up to the confirmation of the sale by the court. The remedy of the mortgagee is confined to an action for the sale of the pledge, or the mortgaged premises, to pay the debt secured by the mortgage, or to an ordinary suit at law to recover the debt itself.

The mortgage is a mere pledge, or collateral security, creating a lien upon the mortgaged property, but conveying no title, or vesting no estate either before or after condition broken.

The statutes of the Territory of Wyoming require actions to be brought to foreclose a mortgage, and negative the common-law attributes of the same.

In the case of Drake *vs.* Root (2 Colorado, 685), the supreme court of the State of Colorado decided that,

"until forfeiture a mortgage is security only, which confers no right of entry on the mortgagee."

The statute of the Territory of Utah negatives the common-law attributes of mortgages, and reads as follows:

SECTION 260. A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover the possession of the real property without a foreclosure and sale. (Compiled Laws of Utah, 478.)

The statutes of Nevada and California are in the exact words of the statute of Utah, above quoted.

In the case of Hyman *et al. vs.* Kelly *et al.* (1 Nevada, 179), the supreme court of the State of Nevada held that the statute in that State restricted the mortgagee to the equitable remedy of foreclosure and sale, and that he was not entitled to a strict technical foreclosure in equity, and could not maintain ejectment for the mortgaged premises.

In the case of Johnson *vs.* Sherman (15 California, 287), the supreme court of the State of California said:

A mortgage is a mere security, and does not vest in the mortgagee any estate in the land either before or after condition broken. Payment after default operates to discharge the lien equally with payment at the maturity of the debt.

The following cases are to the same effect: Dutton *vs.* Warschauer (21 Cal., 609); Nagle *vs.* Macy (9 Cal., 426); Goodenow *vs.* Ewer (16 Cal., 461).

From the statutes and decisions above cited it is clear, I think, that a mortagage in the several States and Territories, within which the lands granted by the act of July 1, 1862, and the act amendatory thereof of July 2, 1864, are located, is not a conveyance of the legal title to the land, but simply a pledge, a security, a lien

thereon, and that no estate is by such instrument vested in the mortgagee, either before or after condition broken.

In each and every of the mortgages presented in this case the legal title, as well as the right of sale and disposition of the lands therein described, is retained in the companies, the trustees indorsing the instrument of conveyance simply to release the mortgages from the tracts conveyed.

If the statutes of the different States and Territories in which the lands described in said mortgages are situated were not what I have found them to be, I should still doubt the right or the power of either of said companies to defeat one of the express provisions contained in the granting act, viz, the right of the government to sell to actual settlers, like other public lands of the United States, the lands remaining unsold after the time limited therein. The grant to said companies was conditional, and they could not defeat that condition by any act not in accordance with the provisions of the act by which the grant was made.

The mortgagees must be considered to have taken the mortgage with full knowledge of the limitations of the right and authority of the companies to make the same. While the companies, by the terms of the mortgages, had the right to sell and dispose of the lands, the trustees were to receive the proceeds of all sales of lands made. This right of the companies to sell the lands having ceased, by virtue of the third section of the act of July 1, 1862, the security of the mortgagees will be subrogated to the moneys accruing from the sales when made by the government.

After full consideration, I am unable to find any reason for the suspension of my decision of July 23, 1878,

and you will, therefore, without unnecessary delay, cause the instructions to be issued to the local officers as therein directed.

The papers filed with these applications are herewith transmitted.

Very respectfully,

C. SCHURZ,
Secretary.

COMMISSIONER OF THE GENERAL LAND-OFFICE.

In the Supreme Court of the United States.

WILLIAM H. PLATT, APPELLANT,
vs.
THE UNION PACIFIC RAILROAD COMPANY et al., appellees.

SUPPLEMENTARY BRIEF ON BEHALF OF THE UNITED STATES.

HAD THE GOVERNMENT THE RIGHT TO SELL THE TRACT OF LAND INVOLVED IN THIS SUIT IN ACCORDANCE WITH THE PROVISIONS OF THE PRE-EMPTION LAW?

The tract involved was patented to the defendant prior to the commencement of proceedings by the complainant to acquire title thereto under the pre-emption law. The defendant claims the legal title thereto under the grant made to said company, approved July 1, 1862 (12 Statutes, 489).

The question therefore arises, What was the character of the title granted to said company by said act? By the acceptance by the company of the grant of lands made to it by Congress a contract was entered into by and between the United States and said company. (*Fletcher vs. Peck*, 6 *Cranch*, 136–7; *McGee vs. Mathis*, 4 *Wall.*, 143; *Grogan vs. San Francisco*, 15 *Cal.*, 613.)

This contract contains various conditions, one of which

to convey an indefeasible and unconditional title, still if the grant contained conditions and limitations, such conditions and limitations would run with the title evidenced by the patent, while it continued in the patentee at least.

The fact, therefore, that a patent has issued to the defendant for this tract, can have no bearing in this case, the land not having been sold by the company at the time the appellant applied to and did enter it.

At that time, the period fixed in the grant within which the company might sell the land had expired, and the same was subject to entry under the pre-emption law. No further legislation was necessary, for the granting act clearly and distinctly pointed out the law under which the lands were to be sold and thereby made that law a part of the granting act.

We submit therefore, that the only title the company ever acquired to this tract of land, was burdened with the condition that it must sell the same during the construction of the road or within three years after its entire completion. If it failed to make such sale, then the United States might sell the land and pay the proceeds over to the company. The proceeds arising from the sale of the lands, was the aid the government granted to said company.

If the court, however, shall be of the opinion that the full legal title to said tract was granted to said company, then we submit, that at the expiration of the three years after the road was completed, the company held that title simply as the trustee of any qualified pre-emptor who might apply to purchase the same, and that the United States, through the proper department, had the right to offer said land for sale. The pre-emption law is executed only by officers of the United States. The

United States was a party to the contract made with said company and reserved the right after the expiration of the time agreed upon to sell and dispose of said lands under that law. The parties to the contract were competent and made it on those terms. No authority was given to said company to sell lands under the pre-emption law and hence that power cannot be exercised by it. (Perry on Trusts, p. 31.)

The legal title to land may be in one person in trust for another. (Seymour *vs.* Freer, 8 Wall., 213.)

When a trust is created for the benefit of a third party, though without his knowledge at the time, he may affirm the trust and enforce its execution. (1 Johns. Chan. Rep., p. 205; 3 *ibid*, p. 261; Bank of Metropolis *vs.* Gottschlick, p. 20.)

The appellant asks that this court will decree that said company convey to him, if it shall hold that the company has the legal title to said tract of land, such title, and we submit that he is entitled to have his prayer granted.

The mortgage was not a disposal of this land. (Revised Statutes of Nebraska for 1866, and also for 1867, page 286.)

CHAS. DEVENS,
Attorney-General.
E. M. MARBLE,
Assistant Attorney-General.

In The Supreme Court

— OF —

THE UNITED STATES.

No. 885, October Term, 1878.

WILLIAM H. PLATT,
APPELLANT,
vs.
THE UNION PACIFIC RAILROAD COMPANY, AND FRED L. AMES,
APPELLEES.

BRIEF OF APPELLANT.

E. WAKELEY,
SOLICITOR AND OF COUNSEL.

In The Supreme Court

— OF —

THE UNITED STATES.

No. 885, October Term, 1878.

WILLIAM H. PLATT,
APPELLANT,
vs.
THE UNION PACIFIC RAILROAD COMPANY, AND FRED L. AMES,
APPELLEES.

This is an appeal from the decree of the Circuit Court of the United States for the District of Nebraska, dismissing the bill of complaint for want of equity.

By stipulation the cause was heard upon bill and answer, at the May term of the Circuit Court, A. D. 1878, the District Judge presiding.

The principal question, if not the only controverted question in the case, is whether by the instrument set up

in the answer, commencing at folio 21, printed record, the lands in controversy (with others) were "disposed of" within the intent and meaning of the 3rd section of the act of July 1st, 1862, incorporating the Union Pacific Railroad Company, so that the lands had, prior to the complainant's settlement and claim of pre-emption, ceased to be subject thereto. That this question is highly important, and involves large property interests beyond those immediately in suit, is obvious from its statement, and from facts within the common knowledge of the country.

But it does not seem to me to be a question difficult of solution, nor one involving unusual elements of investigation.

THE SUBSTANCE OF THE BILL.

The bill, shortly stated, sets forth in substance:

1. That complainant was "in all respects" a qualified pre-emptor.

2. That on July 1st, 1862, the lands (describing them) were such as the Union Pacific Railroad Company could rightfully take under its grant.

3. The grant made to the company under the act incorporating it.

4. That the defendant company was authorized to construct its road westward to a connection with the Central Pacific Railroad, then being built eastward.

5. That, prior to July 15th, 1869, the Union Pacific Railroad Company had been fully completed and had ever since been in operation for all purposes as a completed line, reaching with its Central Pacific Railroad connection, from the Missouri River to the Pacific Ocean.

6. Prior to July 15th, 1869, the lands in controversy had been duly set apart for defendant company under its grant, and on March 26th, 1875, were, with others, duly patented to it.

And the said lands had not, prior to the filing of the bill, been sold or in any manner disposed of by said company, and had, therefore, since July 1872, been at all times subject to settlement and pre-emption.

7. That complainant, since some time in 1874, had continuously been in the possession and occupancy of the greater part of the lands in question; had made on them permanent and valuable improvements, described in the bill, costing about $7,000, and still worth at least $6,000; and that the lands without the improvements were worth $6,000.

8. It states, in detail and circumstantially, that complainant applied to enter the lands by pre-emption, on the 6th of September 1878. This application was rejected. It was renewed September 21st 1878, and, under instructions, then recently received, the land officers accepted this application as regular and sufficient, and put it on file. And pursuant to the same regulations, the defendant company was called upon for a statement as to whether it had or not sold the lands applied for. It answered in writing, that it had not sold them, but had mortgaged them with other lands for ten million dollars. Whereupon, it appearing that they had not been sold or disposed of, the register and receiver allowed complainants claim, subject to his complying with the pre-emption laws. The complainant then filed the required affidavit as a pre-emption claimant, which was accepted, and immediately

made due proof of settlement and occupation to the satisfaction of the land officers; and paid to the receiver two hundred dollars, taking his receipt therefor, and which is held by him for the use and benefit of defendant company.

9. That complainant has the equitable title to the land, and a right to receive the legal title by patent from the United States, or conveyance from the company, or both.

10. It states the commencement by defendant company, and pendency of an action of ejectment for the lands, in the Circuit Court of the United States for Nebraska; and that complainant cannot therein plead and have the benefit of his equitable title—the plaintiff therein holding the legal title, but in trust for complainant.

11. That complainant would be irreparably injured.

12. That defendant Ames claimed an interest as mortgagee or trustee.

13. The relief prayed for is an injunction against the the prosecution of the ejectment suit; a conveyance by the company to complainant of its interest; and general relief.

THE ANSWER

admits, substantially, all the allegations of the bill, except as to the time when the road was completed—alleging that this was in 1874,(but which is here immaterial, as complainant's settlement, in June 1878, was long after that time.) and the allegation that the lands had not been "sold or disposed of" prior to complainant's settlement on them. And, in support of this denial, it sets forth the substance of the instrument relied on as effecting a disposal of the lands, and a copy thereof is annexed.

This instrument will be discussed hereafter.

Such, is the simple and direct issue.

The

ONLY ERROR ALLEGED

is that the bill was dismissed upon the hearing at costs of complainant.

THE REMEDY.

I do not know that complainant's right to enjoin the proceedings in the ejectment suit will be questioned, *providing* the theory of the bill, as to his right to pre-empt the lands, is sustained by the court.

On that theory, the right is clear. Complainant made a valid pre-emption claim to the lands, based on actual and continued occupancy, and cultivation, and the erection of buildings worth several thousand dollars.

Upon the pleadings, his right to the lands is unquestionable if they were subject to pre-emption; his proceedings were regular; his proofs ample and complete, and satisfactory to the local land officers; and his right is indisputable to remain on the lands until his claim shall be finally passed upon in due course, by the land department, and its action be completed. And this is so, whether he is finally to obtain the legal title by patent from the United States, or by conveyance from the railroad company.

If he is in possession under a valid pre-emption claim, now passing through the land department for final decision, it needs no argument to show that he cannot be rightfully ejected; and be dispossesed of $6,000 worth of improvements, and of land of large value by one holding the legal title, but in trust for him.

The ancient and universal rule that the legal title prevails in ejectment is not changed by any statute of Nebraska. Under its code an equitable title cannot be pleaded to defeat the legal title. So that we need not inquire whether such a provision, if it existed, would be a rule of practice in the Federal Court on the law side.

The following are the provisions of the Code on this subject:

Page 637, General Statutes of Nebraska, of 1873.

"SEC. 626. In an action for the recovery of real property, it shall be sufficient, if the plaintiff state in his petition that he has a legal estate therein, and is entitled to the possession thereof, describing the same, as required by section one hundred and thirty-three, and that the defendant unlawfully keeps him out of the possession. It shall not be necessary to state how the plaintiffs estate or ownership is derived."

"SEC. 627. It shall be sufficient in such action if the defendant in his answer deny, generally, the title alleged in the petition, or that he withholds possession, as the case may be; but if he deny the title of the plaintiff, possession by the defendant shall be taken as admitted. Where he does not defend for the whole premises, the answer shall describe the particular part for which defense is made."

The bill assumes that

THE LEGAL TITLE IS IN THE RAILROAD COMPANY

and therefore, that the injunction is necessary to prevent complainant's eviction.

The company, of course, is not in a position to deny this. It cannot commit suicide as a land owner by asserting that, on failure to sell or dispose of the granted lands, within the prescribed time, its title ceased, and the lands reverted to the United States. And, having brought its ejectment suit, alleging that it has the legal title to the lands, it is estopped in this suit, brought to enjoin the other, from denying that proposition. And I think the proper construction of the act is that the legal title remains in the company, until divested by the exercise of the pre-emption right, and its power to sell and dispose of the lands continues until a pre-emption claim is made. The language is not that, on failure to sell, the grant shall be void, or the lands shall revert—but they "shall be subject to settlement and pre-emption."

Judge Dillon so held in the case of Union Pacific R. R. Co., vs. McShane, 3 Dillon 303; and this court evidently approved that holding in the same case on appeal, 22 Wall 461.

If the defendant company, to support its proposition that the lands have been "disposed of" can convince this court that the legal title passed to the trustees by the mortgage, it may thus, by showing itself out of court in the ejectment suit, show also that we do not need an injunction against it. I will discuss this question, as far as necessary, hereafter; but I will say here that in Nebraska, it has never once been doubted, to my knowledge, that a mortgagor can maintain ejectment. This is done daily. It would astonish the bar and the bench in that state to assert

that a mortgagee has such a title that he could maintain ejectment on it.

That the rule giving an injunction to the defendant in ejectment, having an equitable title to protect, should apply to this case, seems to me to scarcely require authority. I cite only 2 Stony Eq., Jur. §882.

Parker vs. The Judges, 12 Wheat, 644.
Gains vs. Nicholson, 7 How, 356 (364.)
Harbison vs. Houghton, 41 Ill., 522.
Hendrick vs. Dallum, Cooke. (Tenn.) 220.
Goodwin vs. McCluer, 3 Gratt. (Va.) 291.

The controlling question is whether, by the instrument set up and relied on in the answer, the lands were "sold, or disposed of" so as to prevent a settlement and pre-emption thereof?

That

THIS INSTRUMENT IS A MORTGAGE

in its form, substance, operation, and intent seems too clear to require argument; and the appellees will not deny that it is.

It purports to be one. It uses such words as these, "that all the lands above conveyed and *mortgaged* &c." (p. 17, fol 23.) "Said trustees may *foreclose this mortgage*" (p. 18 fol 23.) And in various places it speaks of "foreclosure proceedings." In the statement to the land officers to show that complainant could not pre-empt the lands, it was alleged that they had been "mortgaged." The conveyance to trustees instead of to persons loaning the money does not change the character of the instrument. This is

essential when negotiable bonds are to be secured by mortgage, and is the invariable form of railroad mortgages.

So the question is reduced to this:

IS A MORTGAGE A DISPOSAL OF THE LANDS,

and, if so,

IS IT SUCH A DISPOSAL OF THEM

as precludes their settlement and pre-emption?

FIRST.

It is impossible properly to construe the words "sold or disposed of"—especially the latter words—without adverting to, and keeping in view the object of Congress in attaching the condition in question to the grant. An immense quantity of unsettled and unoccupied lands was granted along the proposed line of railroad. Imperial subsidies were added from which the road could be built. To place it in the power of a corporation, at its mere will, or upon its view of self interest, to withdraw this vast domain from settlement and occupancy for an indefinite time; to bar the landless from these millions of acres, and devote them to solitude for an indefinite time to come, would have been utterly at war with the policy of the government from the beginning, in regard to its public lands.

Grants in aid of railroads have usually or always been of alternate sections along their lines. The argument and inducement for making them have been that the United States, as the proprietor of the reserved lands, would receive for them an enhanced price, by reason of the settlement and occupation of the granted sections, as well as of the facility

of reaching those reserved, by means of the completed roads.

But above, and far transcending the pecuniary consideration, have been the beneficient purpose and wise policy of converting the unpeopled public domain, as rapidly as possible into the homes of citizens, and into organized communities. *Railway Co., vs. Prescott*, 16 *Wall*, 603.

To secure these ends Congress said to this corporation —take these lands; get what you can for them; build your road with the proceeds, or pay your debts with them, or put them into your treasury. But if you do not, within three years after your road is finished, either sell them, or so dispose of them that our purpose shall be accomplished, and they shall be devoted to settlement and occupation, the pre-emptor shall no longer be debarred from making his home upon them. Even then, you shall have the price of them—just what the United States would have got from him, if it had kept the lands. Further—you may still go on to sell them, at your own price, unless, before you can do so, the pre-emptor shall take them.

Who shall say this was not a just and highly proper condition? Just, or unjust, it was the condition on which the corporation gladly accepted this grant, liberal beyond precedent. It remains only for the court to construe it, in the light shed upon its purpose and intent by previous kindred legislation—by the circumstances attending it—and by the language in which it is expressed.

SECOND.

The argument upon the other side rests wholly, as I

understand, upon the single proposition that mortgaging the lands was a "disposal" of them.

I think it might be conceded that, in a technical sense, or, in some special sense of the words, the lands were "disposed of" by the mortgage, without conceding that it was such a disposition as was intended by the act in order to protect the lands from "settlement and pre-emption." It is an elementary proposition that when words or phrases may be properly used indifferent senses, that meaning shall prevail, in a particular case, which is called for by the purpose, object, and intent of the contract, the instrument, or the law in which they are found.

So if, in their ordinary sense, it would be proper to apply the words "disposed of" to lands mortgaged, it would not follow that the words were here used in that sense. But I submit that such is not even the popular sense. When a man has mortgaged his farm, still keeping possession, and retaining the ownership, we do not say he has "disposed of" it. Every railroad in the country is mortgaged—many of them to nearly or quite their full value. So is the Union Pacific Railroad mortgaged for a vast indebtedness. But while the company is here insisting that it has "disposed of" its lands by mortgaging them, I have never heard it assert that it had "disposed of" its railroad. When congress enacted that the subsidy bonds should *ipso facto* be a mortgage upon the road, nobody supposed that congress was "disposing of it" even before it was built.

The company still owns, manages and controls it, and declares dividends from its earnings; and I imagine that

an announcement on Wall street that it had "disposed of" its road would astonish its managers.

To "dispose of" a thing, even in the common, everyday meaning of the words, is to part with its ownership; to turn it over to somebody else; or in some way, to get rid of it. To sell land; to give it away; to devise it and then die; to lease it, is to dispose of it. To put a lien upon it, is not.

Obviously, in this case, no disposal of the lands which would contravene or evade the clear purpose of Congress, can be pleaded as a compliance with the condition on which the right of pre-emption was to be denied.

If these lands, within the three years, had been conveyed to the president of the company, or to any other person, without consideration, to be held and disposed of by him for the company's benefit; while there might have been, in one sense, a disposal of the lands, it most clearly would not have been such a disposal of them as was contemplated by the act. Had a land company or syndicate been formed, composed of officers or stock holders of the corporation, to which the lands had been conveyed as a convenience for holding, advertising, selling or otherwise disposing of them for its benefit, this would not have met the condition. For all practical and substantial purposes the lands would have still belonged to the corporate grantee—and would have been as far removed from settlement and cultivation, as if no such machinery had been set in motion to effect a technical compliance with the words of the act.

THIRD.

It is strenuously urged that a mortgage is not only a disposal, but, in fact, is a sale and conveyance of lands.

That it vests in the mortgagee the legal title, leaving only an equitable interest—a mere right to redeem—in the mortgagor; and that this court has so held.

It would be fruitless at this day, to discus the history of the mortgagee's estate or interest with which every lawyer is familiar; or the gradual changes of ruling as to a mortgagee's right, by which the ancient holding that he had a legal estate gave way to the modern, firmly established and well nigh universal one, that he has only a lien. I think the court would be impatient of such an effort.

Nor do I regard it as at all material how this is. The essential character and nature of a mortage does not depend on where the legal title is. Whether it vests in the mortgagee and must be reconveyed when the debt is discharged; or whether it remains in the mortgagor, the instrument is a security only, upon either theory. and its effects the same; the mortgagee can get only his money, if the debt is paid or tendered, and can get the land if it is not. Upon either theory the beneficial ownership is in the mortgagor, subject to the payment of the debt. A question of legislative intent, as this is, cannot turn upon a mere inident of a mortgage—on an abstract theory as to where the naked legal title is, after a mortgage is executed. To say that, upon one theory the lands are "disposed of" by mortgaging them, and upon the other theory they are not, would be making the mere incident of a transaction, instead of the transaction itself, the criterion; and making form of more consequence than substance.

Be the rule what it may be, in the absence of statu-

tory declaration, the matter is settled beyond question by the statute of Nebraska. This declares as follows:

"In the absence of stipulations to the contrary the "mortgagor of real estate retains the legal title and right of "possesion thereof." Sec. 55, p. 881 Gen. Statutes of Nebraska, 1873.

Kyger vs. Ryley, 2 Neb. 20.

The lands in controversy, being in that state, its statutes of course govern, and furnish the rule of construction for all conveyances, contracts and instruments of or relating to the lands.

Chap. X. Story Con. of Laws.

M. Goon vs. Scales, 9 Wall. 23 (27).

Is there found, in the instrument in question, any stipulation that the title and right of possession shall not remain in the Union Pacific Railroad Company?

On the contrary, the affirmative provisions of the instrument unmistakably show that both title and right of possession were to so remain.

Look at some of them, (folio 23, p. 17, record.) "That all the lands herein above conveyed and mortgaged "shall be under the sole and exclusive management and "control of the said party of the first part, who shall have "full power and authority to make contracts for the sale of "the same," etc.

What more complete ownership of lands can there be than is evidenced by "full power and authority to make "contracts for the sale" of them?

Further on, "And said lands shall be and remain at "all times thereafter open for sale to any person who may "desire to purchase and pay therefor." "The party of the "first part may reserve from sale any lands necessary for "depot grounds or other purposes." "And when any tract or "parcel of land shall have been purchased, and paid for * "the same shall be conveyed by the said party of the first "part, and said trustees" etc. In short, the trustees can exercise no restraint upon the absolute power of alienation reserved to the mortgaror, except to concur in fixing the prices and terms of sale — and this only, with a view "to "secure the payment in full" of the bonds. They have merely the usual and indispensable authority to foreclose upon default, or sell the lands at public auction, to get payment of the bonds.

And where does the right of possession remain? The instrument says in terms, (p. 18.) that after default shall have continued one year, "the said trustees may enter "into and take possession of all the lands." etc.

Thus, instead of stipulations to the contrary, the agreement was affirmatively in accord with the statutory provision that the title and right of possession should remain in the mortgagor.

And these considerations, aside from settling where the legal title is, are highly important—it seems to me, they are decisive—in determining the ultimate question. How can it be fairly said that the grantee of these lands "disposed of " them by an instrument which, in terms, reserved to it all the substantial incidents of ownership—possession, power to sell, "sole and exclusive management

"and control," the right to exchange the lands for its bonds and coupons (p. 17, folio 23.), and to apply all the proceeds of sale to the payment of its debts?

FOURTH.

The corporation might have conveyed the legal title, absolutely, without disposing of the lands within the intent of the act.

If they had been conveyed to a trustee, to sell or dispose of for the use and benefit of the grantor, and not as security, the legal title would, of course, have been parted with. They would, in one sense, have been "disposed of." But I think no one would claim that t the right of settlement and pre-emption had been defeated.

The test, therefore, of where we find the legal title to be, is a fallacious test.

FIFTH.

I am satisfied that the point on which chief reliance is placed in the argument for appellees, is that a mortgage —regardless of its form or incidents—in other words a mere pledge of the lands as security for borrowed money—was one form of disposal contemplated by Congress which would bar the right of pre-emption. It is said that here is a mortgage for ten millions of dollars given for the *bona fide* purpose of raising money to help build the road. That it was for a considerable part of the value of the lands. That they were thus utilized to the same end as if they had been sold, and for the very purpose for which they were granted. That this, therefore, was a disposition of them carrying out the intent and purpose of Congress.

This argument confounds the purpose for which the grant was made, with the object of limiting the time during which the lands should be withheld from settlement. In fact it ignores this object. It goes on the hypothesis that the *sole purpose* was to aid the road; and the limitation of time may be disregarded. As an argument to show that the mortgage was not *ultra vires*—that the giving it was a use, or a disposition of the lands, which the directors were justified in making—it is, I may concede, unanswerable. But it remains true, that the mortgage was only a lien upon the lands. It did not advance, or promote their settlement, their occupation, their use for agricultural pastoral or other purposes. In that it gave the trustees a veto power in respect to the price and terms of sale, its tendency was, or certainly its effect might have been, to hinder or obstruct their sale or use for such purposes.

This argument proves too much. See what would follow from it. If a mortgage for ten millions was a compliance with the condition, so would have been a mortgage for one million, or for a thousand dollars. So would have have been a mortgage for any sum, payable at any future time. By paying the interest, and saving a default, the sale, or use for any purpose whatever, could have been postponed, at the pleasure of the corporation, for so long a time as the money could have been borrowed on.

Again, the mortgage has been in considerable part paid. Several millions have been paid as the answer asserts. Suppose all but one million, or a thousand dollars had been already paid. Still, upon this argument, the lands having been "disposed of," they could not be pre-empted. Go one step further. What if every dollar had

been paid; all the bonds taken up and cancelled; and the moragage satisfied? It would still be true, by this argument, that the lands had been "disposed of" within the time limited, and so put beyond the reach of pre-emption. But they would be back in the hands of the railroad company. Would the right to pre-empt be thus revived or called into being? At what stage, if ever, in the gradual lessening and final extinguishment of the lien would this right attach?

The short and straight way out of these perplexing problems, is to say that the mere creation of a lien upon the lands did not withdraw them from settlement and pre-emption. I see no other way out. I see no wrong done to any one by following this way. It permits the corporation to mortgage the lands, subject to the reserved right of settlement and pre-emption. It gives the mortgagee all the rights which the mortgagor had to give; the right to sell the lands for any price that could be obtained, within three years from the completion of the road, or at any time afterwards until pre-empted; and one dollar and a quarter per acre for those pre-empted.

SIXTH.

Finally, it appears by the instrument itself that these rights were precisely what it was intended to give the mortgagees

On page 20, printed record, near the bottom, is this clause in the mortgage.

"It is hereby declared by the parties to this indenture "that all the provisions of said acts of congress, so far as

"they are applicable, are hereby made. and shall be deemed "and taken to be, a part of this instrument, and the said "provisions *in all that concerns the sale and disposal of* "*the said lands*, hereby conveyed to the parties of the "second part, are to observed and strictly and faithfuly "carried out and fulfilled."

Most clearly one of the provisions that "concern the "sale and disposal of the said lands" is the provision under discussion. Indeed what provision is found in the act, on that subject, except that the lands shall be sold or disposed of within the prescribed time, as to which the corporation could vest any authority or discretion in the trustees? It must have been intended that the trustees should unite with the corporation in selling or disposing of the lands within the prescribed time; or, if this was not done, the trustees could receive only the limited price for such as might be pre-empted.

But, upon the argument of appellees, *by this very instrument*, the lands were "sold and disposed of," and the conditions of the act, on that subject, were complied with. Why, then, bind the trustees to observe, carry out and fulfill these very provisions of the act?

SEVENTH.

It is said that our construction ignores the words "disposed of." That these are not the mere equivalent of "sold," and therefore tautological; and Congress must have contemplated some disposal other than a sale.

It would not be difficult to convict any congress of frequent and flagrant tautology in its enactments. But it

may be conceded that the corporation was not restricted in its disposition of the lands to a sale, without weakening the argument that a mortgage was not such a disposition. It may well be that they could have been leased for actual use—for agricultural or pastoral purposes—that portions of them could have been donated to settlers to promote the sale of the others; or donated to towns, or educational or philantrophic institutions; that coal or iron lands could have been leased for working, or the lands put to other uses looking to settlement and improvement. This might have been in harmony with the purpose of congress. But, if, upon the clear reason of the case, a mortgage was not within the words of the act, and if this drives us to the alternative of tautology, so be it. Let congress bear the responsibility of this offense against rhetoric.

EIGHTH.

It is further urged that it is not reasonable to suppose that congress intended to give the grantee only three years to sell these vast bodies of lands, and, at the same time, prohibit mortgaging them; or, if mortgaging was permitted, to compel the mortgagoe to sell within that time, in order to protect them from pre-emption.

The appellant does not deny the right to mortgage, but does insist that the mortgagee took subject to the condition as to sale or disposition.

It must be remembered, in weighing this argument, that, by the original act and amendment, the company had until July 1875, to complete the road. Three years added to this would have given sixteen years from the passage of the act, to dispose of the lands, had the full time been

taken. The unexampled rapidity with which this great work was pushed to completion was not anticipated. It was more likely, when the act was passed, that the time would have to be enlarged, than that it would prove to be longer than was needed. And, surely, sixteen years was a long time for a corporation to keep vacant these immense areas of land, and shut out the pioneer and the frontier man from the right to make a home on them.

And what, at the utmost, is done? Simply a time is fixed after which the corporation or its assigns may be compelled to take one dollar and a quarter for an occasional tract of these lands. This was not a condition to even discourage, much less to prevent obtaining large loans on the security of them. If this was likely to frighten a money-loaner, what would he say to other conditions under which, beyond doubt, he had to take his security? By Section 5 of the act, the Secretary of the Treasury could take possession of the lands for the use and benefit of the United States, upon default of paying the government bonds; and, by Section 6, several conditions subsequent are annexed to the grant, the performance of which would depend on the corporation.

Even if compelled to sell the lands in large bodies for low prices, in order to make sales within the prescribed time—this was not a necessity which it is unreasonable to suppose was within the contemplation of congress. This might comply with the spirit as well as the letter of the act; for the self interest of private owners who had invested their money in the lands, could be relied upon to put them in market as fast as practicable.

Having given such reasons as occur to me why these lands were not "disposed of" by the mortgage, I close my argument here, submitting it to the just and indulgent consideration of the court. Your Honors will find a stronger one, on the same side, in *Railway Company vs. McShane*, made then in behalf of the Union Pacific Railroad Company.

It may be suggested that

FURTHER LEGISLATION IS NECESSARY

to enable the pre-emptor to avail himself of his rights.

That legislation might make the appropriate proceedings for obtaining it more plain is, I think, true.

But so far as the corporation and trustees are conserned, their right is only and merely to get the pre-emption price of the lands. This, in the case here, is deposited with the register of the land office for them. They do not object that the money should have been tendered to them or either of them; but admit that they refuse to take it (bill p. 5 fol. 8; answer p. 13, fol. 18) and put their defense on the sole ground that we have no right to pre-empt.

That the proceedings to initiate and perfect the pre-emption right must be through the land department of the government, as in the case of "other lands," can scarcely be doubted.

Whether the pre-emptor is to get his title by patent, or by conveyance from the company, or both, he is certainly entitled to be protected in his possession as prayed for in the bill; and to have the ejectment proceedings perpetually enjoined, or enjoined until the land department shall have closed the consideration of his claim, and either upon terms or without, as may be just. If entitled to any relief the decree appealed from is arroneous.

My own judgment is that the legal title has passed forever from the United States by its patent; and that when the pre-emptor has finally established his right through the land department, it is determined that the legal title is held in trust for him; and the court, when appealed to, will cause it to be conveyed to him.

E. WAKELEY,
Solicitor and Counsel for Appellant.

...section of the act of Congress of July 1, 1862, certain public lands were granted to the Union Pacific Railroad Company. The grant was subject to a condition in these words:

"And all such lands so granted by this section, which shall not be sold *or disposed of* by said company within three years after the entire road shall have been completed, shall be subject to settlement like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company."

Stats. at L., 12,492.

The lands have never been sold. On the 16th April, 1867, the company conveyed the land in trust to secure the payment of certain bonds. The defendant Ames is now the trustee under this deed. The bonds are payable in twenty years. The dates of the bonds do not appear.

The trust deed contains this clause:

"And it is hereby declared by the parties to this indenture that all the provisions of said acts of Congress, so far as they are applicable, are hereby made and shall be deemed and taken to be a part of this instrument."

Trans., p. 20.

The Union Pacific Railroad was completed on the 6th November, 1869. (U. S. *vs.* Union P. R. R. Co., unreported.) In 1874 the complainant settled upon and has since been in the possession and occupancy of a parcel of land, being a part of that included in the grant to the Union Pacific Railroad. He has built upon it a dwelling-house and other buildings and put up fences, and the improvements made by him are worth $6,000.

On the 21st September, 1878, the complainant had done all the things required by law to entitle him as a

Supreme Court of the United States.

WILLIAM H. PLATT, *Appellant*,
vs.
THE UNION PACIFIC R. R. CO. ET AL., *Appellees.*
} Oct. Term, 1878. No. 885.

STATEMENT OF FACTS.

By the 3d section of the act of Congress of July 1, 1862, certain public lands were granted to the Union Pacific Railroad Company. The grant was subject to a condition in these words:

"And all such lands so granted by this section, which shall not be sold *or disposed of* by said company within three years after the entire road shall have been completed, shall be subject to settlement like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company."
Stats. at L., 12,492.

The lands have never been sold. On the 16th April, 1867, the company conveyed the land in trust to secure the payment of certain bonds. The defendant Ames is now the trustee under this deed. The bonds are payable in twenty years. The dates of the bonds do not appear.

The trust deed contains this clause:

"And it is hereby declared by the parties to this indenture that all the provisions of said acts of Congress, so far as they are applicable, are hereby made and shall be deemed and taken to be a part of this instrument."
Trans., p. 20.

The Union Pacific Railroad was completed on the 6th November, 1869. (U. S. *vs.* Union P. R. R. Co., unreported.) In 1874 the complainant settled upon and has since been in the possession and occupancy of a parcel of land, being a part of that included in the grant to the Union Pacific Railroad. He has built upon it a dwelling-house and other buildings and put up fences, and the improvements made by him are worth $6,000.

On the 21st September, 1878, the complainant had done all the things required by law to entitle him as a

settler and pre-emptor to receive from the United States a patent for the said parcel of land, and had applied for such patent. He had paid to the proper officers of the United States $1.25 for every acre of the said parcel of land.

On the 24th September, 1878, the Union Pacific Railroad Company brought an action of ejectment against the complainant to recover this parcel of land.

On the 28th September, 1878, the complainant brought his bill against the company and the trustee of the bondholders praying that the ejectment suit might be enjoined and the company be decreed to convey the land to him. The bill was dismissed October 4, 1878, and this appeal was then taken.

Assignment of Errors.

The court below erred in not holding—

1. That the lands are "not disposed of" within the meaning of the act of July 1, 1862, and that the right of settlement had accrued under that act.

2. That the appellant had acquired an equitable title to the lands.

3. That the appellant was entitled to an injunction until he could perfect his title, or to a conveyance from the Railroad Company.

Brief of Argument.

I. The land in question has not been *sold or disposed of* by the company within three years after the completion of the road, and is, therefore, subject to settlement and preemption by the appellant.

It is not claimed that the land has been sold. It has been conveyed in trust to secure certain bondholders. The question in this case is whether by the deed of trust the land has been "disposed of" within the meaning of the statute.

The deed of trust is by its terms and the laws of Nebraska in effect a mortgage.

The question, then, may be stated as being whether a *mortgage* is a *disposition of* the lands within the meaning of this statute.

The word "dispose of" has not an exact technical meaning as the words "sell," "exchange," "mortgage." It is a popular word, and its sense varies with its position. It is not denied that it may in some cases include the sense of "to mortgage." What particular meaning attaches to it in any given sentence is a matter of construction.

The contention of the appellants is that in the charter of the Union Pacific Company it is used in the sense of "to sell." The usual popular meaning of "to dispose of" is "to sell." Webster's difinition is "to exercise *finally* one's power of control over; to pass over into the control of some one else; to alienate; to bestow; to part with; to get rid of." Worcester's is "put out of possession of."

Every one of these synonyms points to a transmutation of title as the essential meaning of the word. It follows that the meaning contended for by the appellees is exceptional, and the burthen is upon them of making out the exception upon which they rely.

2. The usual technical meaning of "to dispose of" is "to sell."

A general devise with power to dispose of carries the fee.

Redfield on Wills, Vol. II, 334, note.

A devise with power of disposition gives power to convey the fee.

Lyon *v.* Marsh, 116 Mass., 232.

In Ellslow *v.* Schilling, 42 N. Y., 79, the power to dispose of there discussed, is a power to convey the fee absolutely.

Now a trust for sale, *if there be nothing to negative the settler's intention to convert the estate absolutely*, will not authorize the trustee to execute a mortgage, (Lewin, 363.) By parity of reasoning a power "to dispose of" (which prima facie is a power to sell,) should not be construed to include the power to mortgage "*if there be nothing to negative the grantor's intention to convert the estate absolutely.*"

3. The familiar principle that a public grant is to be construed strictly against the grantee applies here.

To construe here the words "to dispose of" as equivalent to "to mortgage," would be to take the view most unfavorable to the grantor.

4. But the controlling rule of construction in arriving at the meaning of a word in a statute is to take that one which will carry out the purpose of the legislature.

This court has said in speaking of this statute what the purpose of this particular provision is: "it is wisely provided that these lands should not be used by the company as a monopoly of indefinite duration. The policy of the Government has been for years to encourage settlement on the public lands by the pioneers of emigration, and to this end it has passed many laws for their benefit. This policy not only favors the actual settler, but it is to the interest of those who by purchase own adjacent lands, that all of it should be open to settlement and cultivation. * * Any one who has ever lived in a community where large bodies of land are withheld from use and occupation or from sale except at exorbitant prices, will recognize the value of this provision. It is made for the public good as well as that of the actual settler."

Railway Company *v.* Prescott, 16 Wall., 609.

The power to mortgage plainly defeats this purpose. The bonds in this case run twenty years, and during that period the policy of Congress is contravened, if the appellee's construction of the charter is correct.

It is no answer to say that during that period the company may sell at $1.25 per acre. Such a sale would be discretionary and open to every one; the object of Congress was to make it *obligatory* and to confine it to *actual settlers*.

R. R. Co. *v.* Prescott, 16 Wall., 683.

This consequence will ensue if the appellee's construction is correct. Should the company at the expiration of twenty years pay the bonds, and obtain a release of the mortgage, it will then have the legal title discharged of the condition imposed by Congress. It would be in the power of any grantee through the formality of a mortgage to defeat the condition.

If it is held that on satisfaction of the mortgage the condition will revive, then we would have a defeat *pro tanto* of the condition and the anomalous ruling, that in 1878 the lands had been "disposed of," and twenty years afterwards 'had not been disposed of."

It is submitted, therefore, with confidence, that the construction of the appellants promotes, that of the appellees entirely defeats, the purpose of the act.

The phrase "to dispose of" seems to have been used here as the synonym of "to sell." "'Or' is not always disjunctive. It is sometimes interpretative or expository of the former word: '*balivam vel jurisdictionem.*'" Dwarris (Potter ed.), 291.

But a distinct meaning can be assigned to the word "to dispose of" without giving it the sense of "to mortgage." An exchange, a gift, an appropriation of the lands to the necessary uses of the railroad, would be "dispositions" within the meaning of the act.

Where a different meaning has been in any case given to the word "to dispose of," it has been derived from the purport of the statute or deed in which it has been found. On this principle the power "to dispose of the public lands" given to Congress by the Constitution, would clearly include power to create any estate or charge whatever.

5. Although its attention was not called to this precise point in Railroad Company *v.* Prescott, (16 Wallace, p. 609), this court seems there to have taken the phrase "to dispose of" as the equivalent of "to sell." Its language, in speaking of this very statute, is "Looking at this policy and to the very large quantity of lands granted by this statute to a single corporation, Congress declared that if the company did not *sell* these lands within a time limited by the act they should then, without further action of Congress or of the company, be open to the actual settler," &c.

6. No wrong is done to the mortgagees by taking the appellant's view. The defect in their title is a legal one. They also had notice of the conditions in the act of July 1, 1862. By way of abundant caution, the company inserted in the mortgage a clause making the provisions of the act of Congress a part of the mortgage. (Trans. 20.)

This construction operates no hardship on the mortgagees, because the company expressly reserved (Trans. p. 17) a power to sell at any price. It makes no difference to them whether the sale at $1.25 an acre be made by the company or the United States.

II. The equitable title to the land has vested in the complainant.

The complainant has done all which, as a pre-emptor, he is required to do, to entitle him a patent. It is the

settled law of this court that one who has done so, has acquired a valid equity to a patent.

Frisbie *v.* Whitney, 9 Wall., 187.
Hedthing *v.* Low, 15 Wall., 77.
Shepley *v.* Cowan, 91 U. S., 340.
Moore *v.* Robbins, 96 U. S., 539.

III. The complainant, as equitable owner, is entitled to be protected by injunction until he can get a legal title by patent, or to be decreed a conveyance by the railroad company.

Two views may be taken as to the legal title:

1. That, by the act of Congress, it was divested in the United States on the expiration of three years from the completion of the road.

This view is favorable to the complainant's right, and is that which will be urged by the United States. But attention is specially asked to the point that the complainant's case does not depend upon the success of this contention. Another view may be taken of the legal title, which would equally entitle the complainant to relief. That view is:

2. That the legal title continued in the Union Pacific Railroad Company after the expiration of three years from the completion of the road, and will be divested and put in the patentee on the issue of the patent.

The act is silent as to the legal title; it is distinct that the land (not sold or disposed of) shall be *subject* to settlement and pre-emption.

The use of the word "subject" implies that, in the mind of Congress, the legal title continued in the company. It is the word which would be used where the pur-

pose was to impose a servitude, lien, charge or condition on the legal title.

The nature of the right thus concisely given, *i. e.* of settlement and pre-emption, is to be derived from the statutes. It is the right to get a legal title to public lands by the performance of certain acts on the part of the pre-emptor, and of certain formalities on the part of the United States.

To give full effect to the act of July 1, 1862, the legal title must vest in the pre-emptor, when all these acts and formalities, including the issue of the patent, have been observed. If this consequence does not follow, then the lands "are *not* subject to settlement and pre-emption like other lands." The right will be diminished to the extent that the pre-emptor, under this act, gets less than any other pre-emptor would.

This limitation over in favor of actual settlers under the act of July 1, 1862, is exactly analagous to a limitation in a deed to a use to be appointed by a stranger to the deed.

Sugden on Powers, chap. 2, 78.

Just as the legal estate in such a case is divested out of the grantee in the deed, when the stranger appoints the use, so the title in the Union Pacific Railroad Company will be divested when the patent issues to the appellant.

But it may be said that only the grantor can enter for breach of a condition.

This is a purely technical rule of the feudal law applicable to common law conveyances, and not to conveyances under the Statute of Uses, to executory devises, trusts, or statutory titles.

In a conveyance under the Statute of Uses (the usual conveyance in this country) on the determination of an estate subject to a condition, the estate limited to succeed it vests, by virtue of the deed, without an entry by the grantor. It is difficult to conceive of any reason why Congress cannot create a springing use, which an indi-

vidual may do by resorting to the Statute of Uses. Even in common law conveyances, an estate limited after a conditional limitation, vested without entry of the grantor.

No good reason can be given why Congress has not the power to limit an estate to result to the United States or to vest in a third person on the breach of a condition annexed to a precedent estate. The only question is whether it has done so, and it seems clear that such was its purpose in this statute.

If the subsequent estate vests by virtue of the grant, then the grantee may bring his action to recover possession, or may defend an action as this appellant is doing.

The decision of this court in Farnsworth *vs.* R. R. Co., 92 U. S., 49 seems practically to affirm this principle. There the estate limited over was held to vest on breach of the condition without entry by the grantor, as the legislative declaration relied on bears no analogy to a common-law entry.

It may be said that there is in this case a forfeiture which cannot be enforced without judicial proceedings. The answer is that no forfeiture of any franchise is insisted on. The divesting of an estate on breach of a condition is in no sense a forfeiture. It certainly is not where the estate subject to the condition is conveyed to an individual. There is no ground for the distinction that the shifting of an estate subject to a condition from a corporation is a forfeiture of an estate. Such a shifting takes place as in other cases of estates in land. No instance can be cited of a *scire facias* or other writ to divest a conditional estate belonging to a corporation.

It is admitted that some proceedings might be necessary to divest an estate for anything not annexed to the estate by way of condition. That would be a forfeiture.

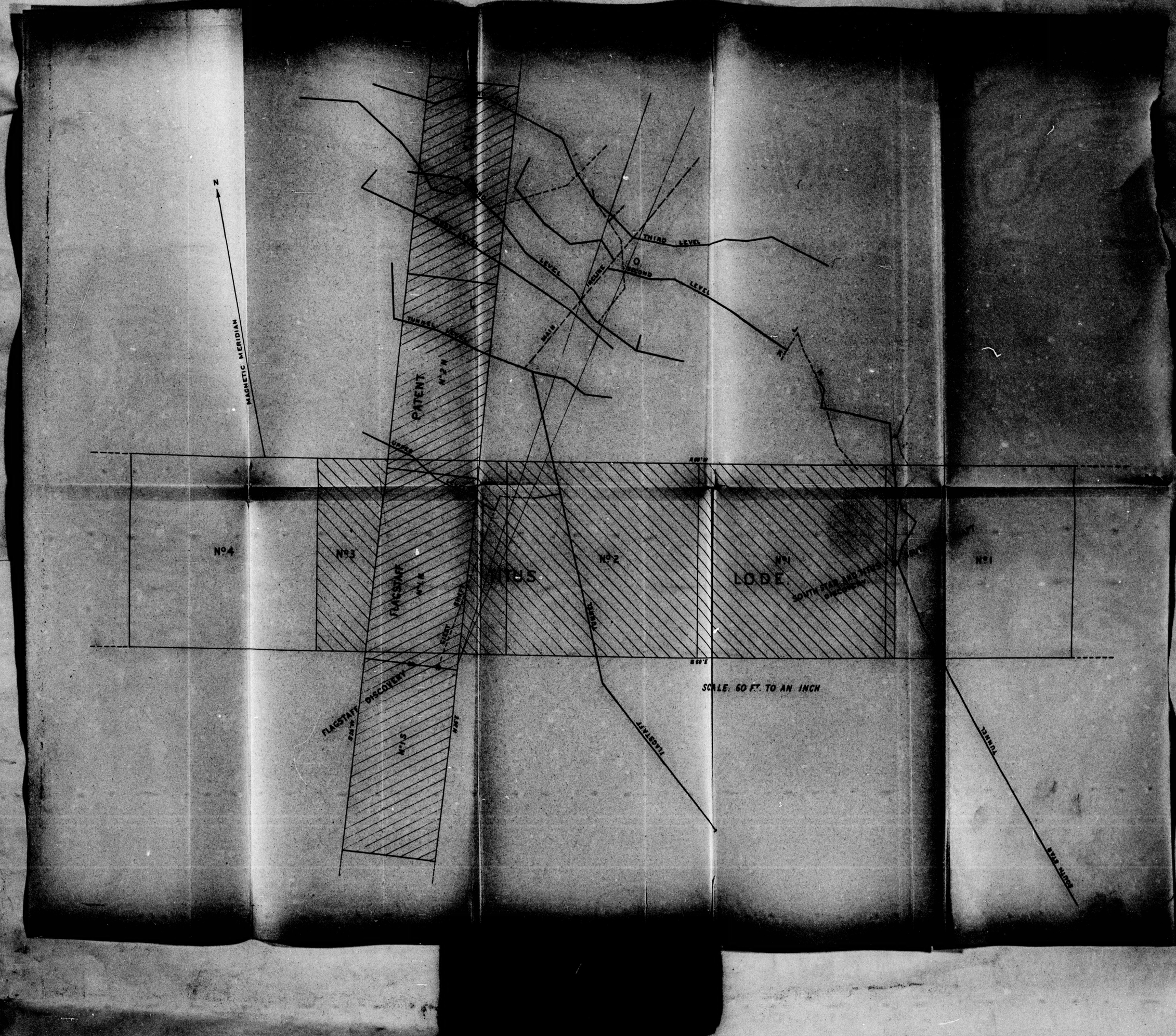
This court in Railway Co. *vs.* McShane, 22 Wall., p. 461, expressly reserved its decision on this point, saying:

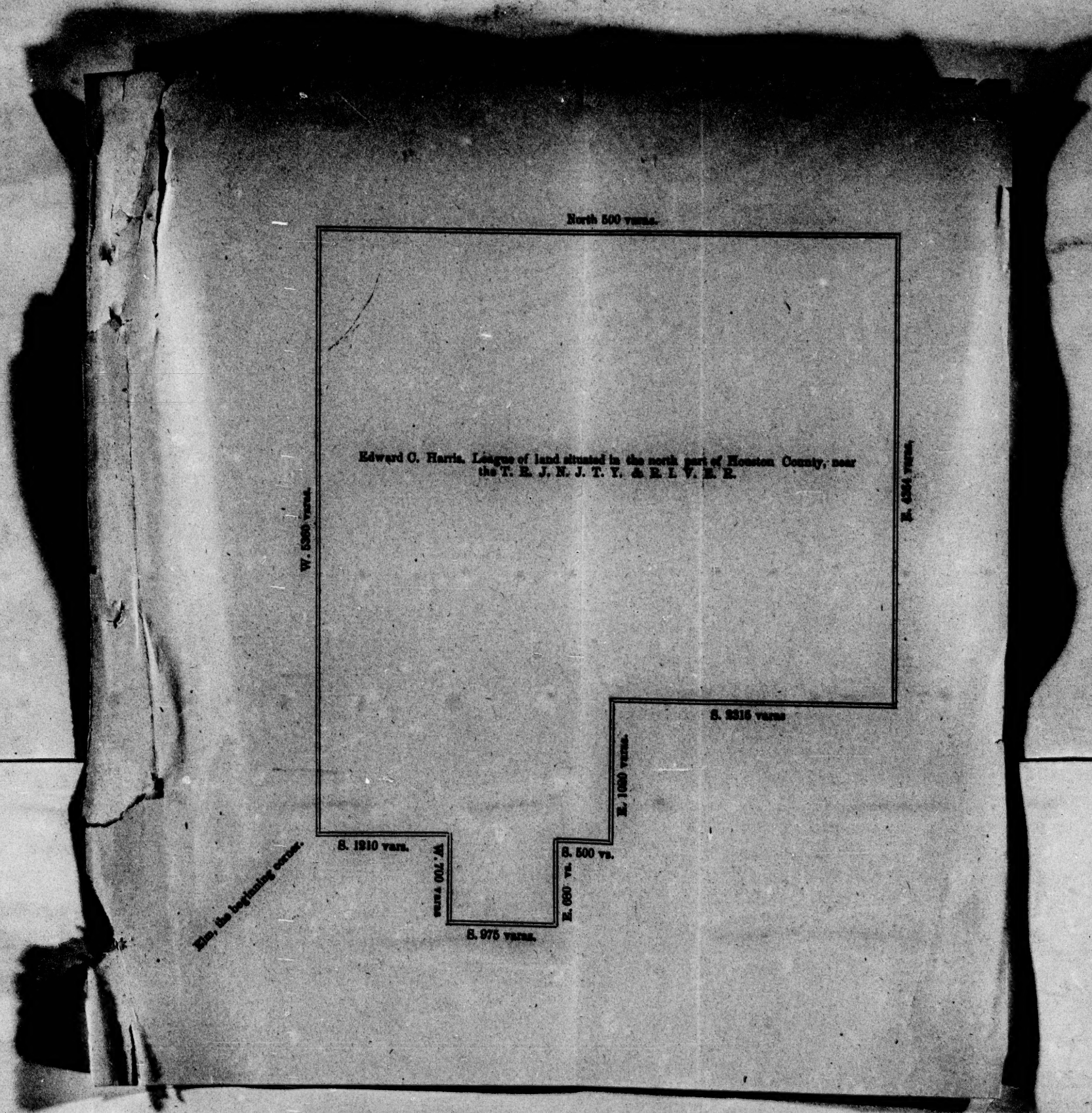
"We do not now propose to decide whether any such legislation or action is necessary, or whether any one having the proper qualifications has the right to settle on these lands."

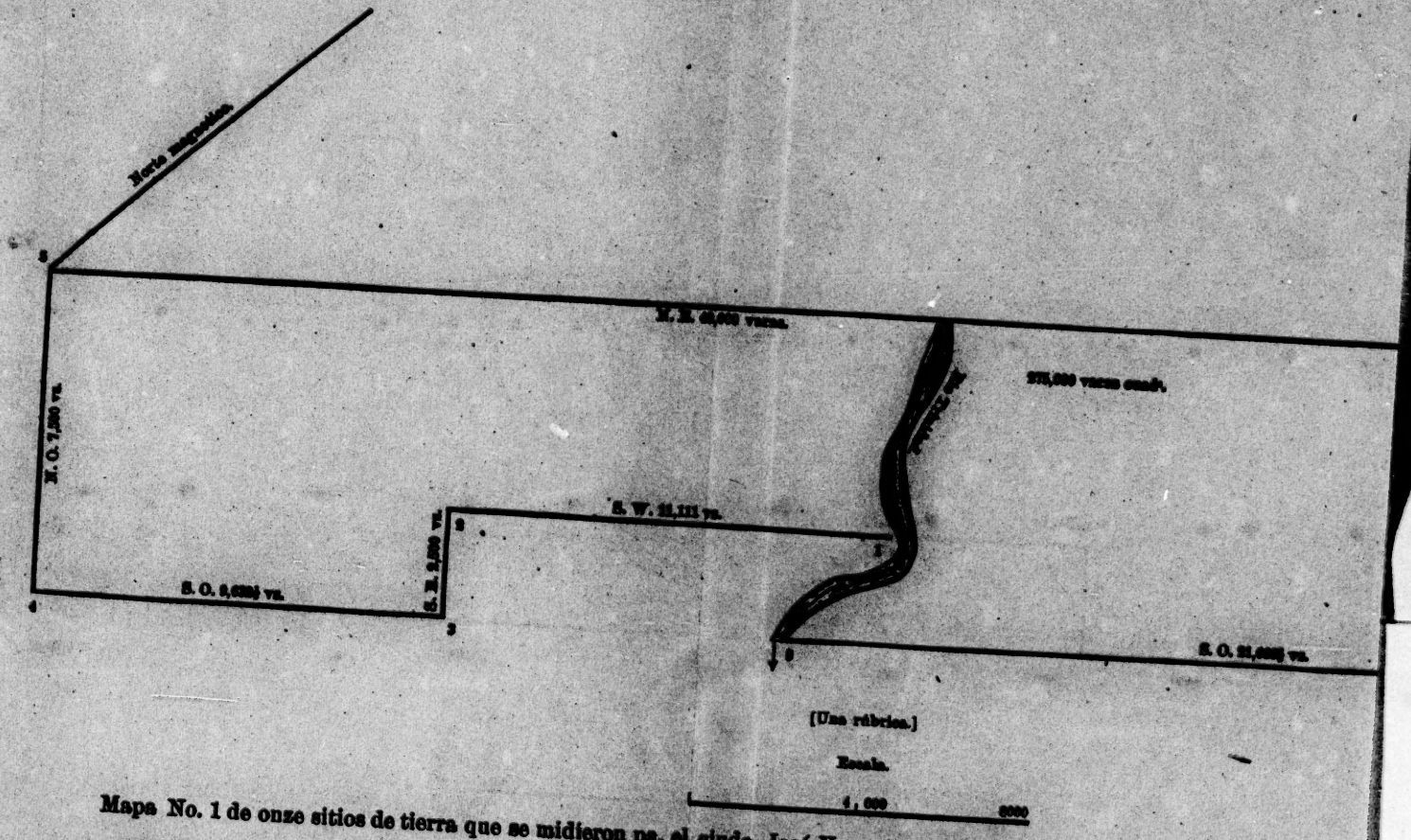
If the appellant's contention is correct, he is entitled to an injunction until he can perfect his legal title by getting a patent.

3. But if it be held that the legal estate is not already out of the Railway Company, and that it will not be divested by issue of a patent to the appellant, then a court of equity may enforce appellant's equity by decreeing a conveyance by the company.

JAMES LOWNDES,
Of Counsel for Appellant.


N
MAGNETIC MERIDIAN
PATENT
N°2 N
THIRD LEVEL
SECOND LEVEL
INCLINE
MAIN
THIRD LEVEL
UPPER
R.99°W
N°4
N°3
FLAGSTAFF
N°2
LODE.
SOUTH STAR AND FLAGSTAFF CONSOLIDATED
N°1
N°1
S.89°E
FLAGSTAFF DISCOVERY
S.28°W
N°3
FLAGSTAFF
TUNNEL
SOUTH STAR
SCALE: 60 FT. TO AN INCH


North 500 varas.
Edward C. Harris. League of land situated in the north part of Houston County, near the T. R. J. N. J. T. Y. & R. I. V. R. R.
W. 5360 varas.
E. 4264 varas.
S. 2315 varas
E. 1020 varas.
S. 1210 vars.
W. 700 varas
S. 500 vs.
E. 650 vs.
S. 975 varas.
Elm, the beginning corner.



[Una rúbrica.]

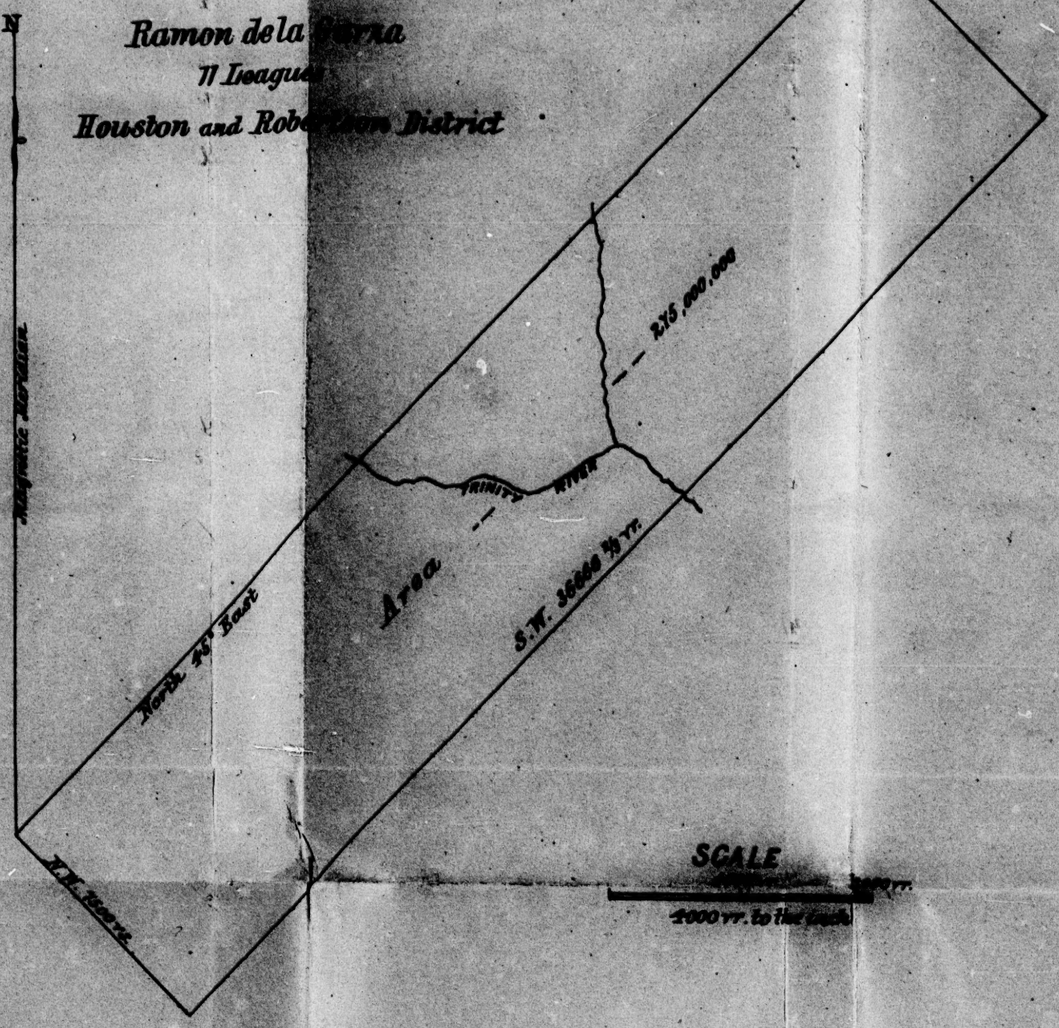
Escala.

1,000 2000

Mapa No. 1 de onze sitios de tierra que se midieron pa. el ciudo. José Ygnacio Aguilera.

(Firmado) JOSÉ M. J. CARVAJAL, *A. G.*

N.1



No. 570 | Airhart vs. Massieu et al | Page 217

(Copied from the original Certified sketch at the Genl. Land Office, July 20th 1838)

Map No. 2 of 11 Leagues Land, which are surveyed for the citizen Manl Reonda José M.J. Carvajal

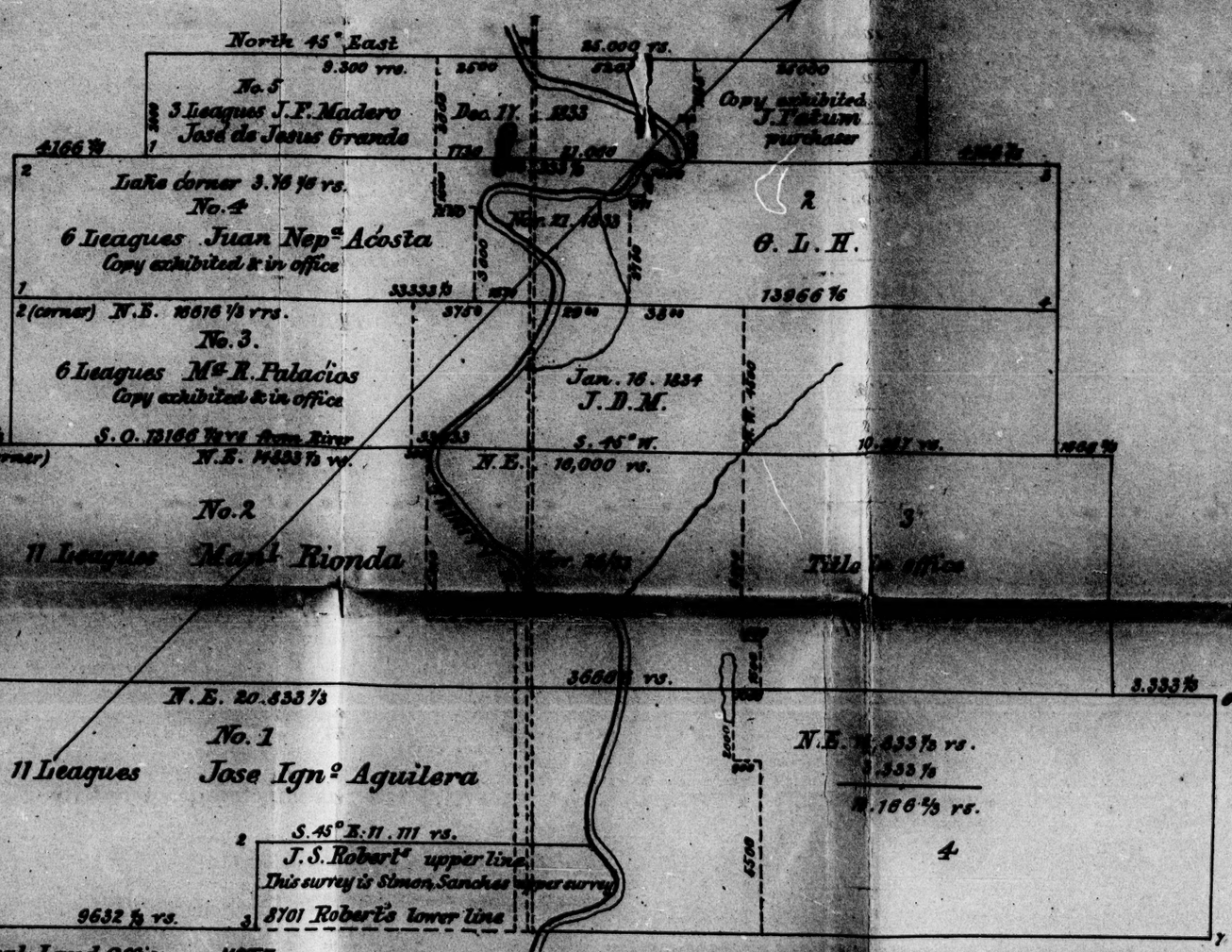
Copy – Crenxbaur

N.1

Houston & Robertson Dist. No. 1.

NOTE

A first Landmark a post-oak of 30 inches diam West of the river and North 70° 45' W. 3/5 vr from an Ash. S.W. 11. III vrs.
2d Landmark a stake on level ground, not having any trees. S.E. 2500 vrs.
3d a stake at S. 45° 30' E 10 vrs from a black jack 12 inch diam and S. 31° E 11 2/3 vrs from a Hackberry 12 inch diam. Thence S.W.



General Land Office
Austin February 3d 1873.

I, Jacob Kuechler, Commissioner of the General Land Office, do hereby certify that the original map (from which the five surveys on the Trinity river above mentioned have been copied) has been in this office since 1846, and probably for many years previously –

In testimony whereof I have hereunto set my hand and caused the seal of this office to be affixed the date first above written.

Jacob Kuechler
Commissioner

NOTE 15 miles below this is the saline on the Trinity, and the crossing of the Comanche Road to Nacogdoches is about 3 miles lower. The crossing of the San Antonio Road is about 70 miles from this lower survey of Aguelero one of the 3 forks of Trinity River is below this a few miles

Genl Land Office Jan. 27/73–

I, Jacob Kuechler, Commissioner of the General Land Office, do hereby certify, that the above sketch with notes is a correct and true copy, taken from a sketch of Houston and Robertson District marked No. 1 on page 13 in Atlas G. on file in this office.

In testimony whereof I hereunto set my hand and caused the seal of this office to be affixed the date first above written.